

THE SOCIAL STRUCTURE OF FREEDOM

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THE SOCIAL STRUCTURE OF FREEDOM

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What is the nature and basis of social association? The object of this essay is to argue that actual human interactions that are binding are constituted through the mutual recognition of the autonomy of men or the freedom to determine their own ends. On this view, freedom is the structure of a complex human practice.

Chapter I introduces the argument by suggesting why the concept of autonomy would be regarded as the basis of human interaction. The argument is made through an examination of attempts to account for social association by appeal to the specific ends and capacities of men. These efforts fail because they exclude consideration of the autonomy of men, without which obligation to social association cannot be understood. The concept of autonomy is formal in the sense of abstracting from substantive principles of behavior. The attempt then is to see whether autonomy itself can be the basis for actual interactions that are binding. But the concept of autonomy admits of different interpretations: the freedom of men to decide their own ends may be seen as a capacity belonging to the individual apart from his social relations; alternatively, the freedom of men to decide their own ends may be seen to be possible in and through the interactions of men.

Chapter II presents the negative argument that the existence of actual social relations is inexplicable if autonomy is taken to be a capacity that the individual possesses independent of the structure of his interactions. The critical appraisal of the assumption of mutually independent agents is undertaken through an examination of three important models: legal positivism, social contract theory and Hart's theory of rules. The first difficulty with the three models is that they either do not attempt to account for the elements of obligation in social association or the accounts of obligation they offer are unsatisfactory. With Hart's theory, however, it is shown that obligation can be introduced. There is, however, another difficulty which is intrinsic to all three models. All attempts to account for social association among mutually independent agents fail to show how social association can exist as an actual practice.

Chapter III outlines the positive argument that the practice of social association is constituted through the mutual recognition of the formal capacity of individuals to determine their own ends. The argument is developed through an examination of three interrelated concepts: personality, property, and mutual recognition. Personality is the abstract capacity of men to decide what they are to be or do. Property or the equal entitlement of men to pre-empt things for their own ends is the manifestation of their capacity as persons. The mutual recognition of their capacities as persons, as mediated through its embodiment in the right to property, constitutes the practice of social association. It is suggested that this structure of rights is practically sustained in modern society through the fact that the material activity of satisfying needs and wants involves the use of a standard of value which presupposes the membership of men in a community of free persons.

Chapter IV indicates some implications of the analysis of social association as a guidepost to further inquiry. The assessment of the substantive inequalities of men in social association acquires a distinctive significance if the basic structure of social association is a practice of rights. The principles of distributive justice which have been proposed to resolve the substantive differences of men are seen to be in conflict with the constitutive principles of the practice of rights. This is shown by drawing attention to the difference in the status of men as persons free to determine their own ends within a practice of rights, and their status as means for ends immanent to the process of production. Since the principles of distributive justice tend to be dictated by the ends of production, the treatment accorded to men under these principles is also in conflict with their status as persons in the practice of rights. It is then suggested that certain possible transformations in the process of production would do away with the conflict between the status of men in the sphere of rights and their status in the sphere of production. And with the resolution of the conflict between the two spheres, the question of distributive justice would lose its importance.

PREFACE

This preface is primarily designed to elucidate the title of this study--The Social Structure of Freedom--which, in turn, is aimed at indicating what the subject-matter of the inquiry is not. Freedom is a protean term, and its varied religious, moral, political and social meanings are importantly interrelated. This essay deals with freedom insofar as it appears in the interaction of men. And of this form of freedom, the political interactions in which freedom and power are related are not considered. Instead, following the important distinction between the social and political, clearly drawn for the first time in Hegel's Philosophy of Right, the focus is placed on the social aspect of freedom.

Underlying the stress on the analysis of freedom in the social interactions of men is a philosophical and methodological thesis concerning the concept of freedom. This is the idea that freedom is not a special attribute or ideal of individuals; rather, it is the structure of a distinct form of relation among men. Freedom is, therefore, to be understood as a practice. Philosophical analyses of the concepts of right, obligation, power, justice depend on an account of the social structure within which freedom is realized. The apparently unending arguments on the meanings

of basic social and political concepts stem in part either from overlooking the character of freedom as the structure of a complex human practice or from adhering to unexamined assumptions concerning the structure of human interaction. In either case, insufficient attention to the structural features of the freedom of men yields divergent analyses of crucial social and political concepts. And the basis for decision between such interpretations seems to become prematurely moral, ideological or, worse, arbitrary.

Once it is recognized that the freedom of men is to be understood as an actual practice, it can be seen that human association is constituted through different, competing and even incompatible principles. This character of social association is indicated toward the close of the essay through an examination of the principles of distributive justice.

For the idea that the beginning of social and political wisdom is to be found in the recognition that the freedom of men consists of a complex practice as well as for the remarks on the implications of this analysis, my reliance on Hegel and Marx is evident on virtually every page. To avoid tedium, I have refrained from documenting this in any great detail. In the exposition of the view that I wish to reject, I draw upon the important and illuminating writings of H.L.A. Hart.

The debts incurred in even so modest an undertaking are surprisingly many. I am especially grateful to my friend, teacher and dissertation advisor, Mr. Dove, who first introduced me to the thoughts of Hegel while I was an undergraduate. And in the four or so years since, he has kindly and patiently discussed these issues with me. To my conversations with him, I owe much of whatever is of merit in this essay. I have also benefited from various seminars with the graduate faculty of Philosophy at Yale. In particular, I should mention Mr. Schrader's seminar on Kant's moral philosophy which afforded me the occasion to reflect on Kant's profound analysis of the concept of autonomy. Mr. Fogelin's most instructive seminar on Wittgenstein's later writings brought me to an awareness of how the concept of a practice entered into recent Anglo-American philosophy.

I am grateful to my friend Margaret Morgan who has been endlessly helpful and generous throughout the time I spent on the essay. For discussions on social and political questions, especially in connection with Max Weber, I am indebted to my friend and Anthony Kronman. I must also acknowledge the help of Mrs. Ames and Mrs. King who were burdened with the unrewarding labor of typing.

Finally, I wish to express my deep appreciation for my compatriots and comrades whose exemplary dedication to the cause of freedom in Ethiopia has been a continual source of strength and inspiration.

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CHAPTER I

INTRODUCTION: TWO ACCOUNTS OF THE SOCIAL

I. Introductory

Social association is a unity of men in interaction. The interactions among men are governed by rules prescribing the forms of behavior that are to be taken as the standard among those engaged in the relation. More complex social associations include rules and practices conferring the roles that are to be fulfilled, and defining the offices to be held by individuals. The rules governing the relations among men in society are not, however, simply prescriptions as to what the members ought or ought not to do. In general, rules of social association are constitutive of the interactions among those party to the relation. In other words, the rules define the nature of the actions of men within society. The characteristically social significance of the activities of the individuals cannot be understood apart from the rules governing their relations. To inquire into the nature of society is, therefore, to inquire into the nature of the rules constitutive of such an association.

It is an important feature of the rules of social association that they require some sort of acceptance by those engaged in the relation. Since the joint activities

of social association acquire their significance through the constitutive rules, engagement in these relations involves some kind of acceptance of the governing rules. The acceptance of rules of social association can take many different forms. Acceptance of the rules of social association might involve just the use of the rules as the standards governing behavior in the relations among men, and the application of penalties against deviations from the standard forms of conduct. Within such a simple association, acceptance of the rules of social association does not require the consideration of the rules independent of their customary use as the standards of behavior in the interactions of the group, and the insistence on sanctions for departures from the standard. If this is all that acceptance of the rules of social association involve, an account of the rules and, consequently, of the association would consist simply of a description of the forms of conduct taken as standard.

The question of a philosophical account of social association arises in the situation in which acceptance of the constitutive rules requires reference to something other than adherence to the forms of conduct they prescribe as the standard in the interactions among the members of the association. This characterization of the situation in which a philosophical account of social association is possible must be carefully stated. More specifically, it must not be identified with the varieties of particular interpretations

given to the matter of independent appeal. For example, it might be taken to mean that acceptance of the rules of social association requires appeal to something independent of the rules of social association. What is appealed to might be understood to be something independent of social and political association altogether. Or, it might be interpreted as involving reference to something that is independent of what men might do or desire. A quite different interpretation would be to regard what is appealed to as being part of the body of societal rules or laws where these are held to consist of rules other than just prescriptions as to what men ought or ought not to do. The claim here as to the situation under which the question of an account of society can arise does not involve commitment to these particular interpretations. Instead, the claim is the limited one that the possibility of an account of social association arises in the circumstance in which acceptance of the rules of interaction goes beyond the mere observance of the conduct they require as the standard in the relations among men. Thus, the question of an account of social association comes up insofar as the actions required, the roles conferred and the duties imposed by social rules cease to be regarded merely as part of the unalterable objective circumstances in which men are placed, and consequently as possessing a status quite independent of what men might desire or do.

To speak of an account of social association that is possible once acceptance of social rules ceases to be their mere observance as standards of conduct in the interactions of the members might suggest that there is only one way in which the request for an account can be construed. But, in the circumstance in which acceptance of the governing rules of social interaction goes beyond customarily following what they require, there are a number of interrelated questions that can be posed regarding social association. It becomes possible, for example, to inquire into the nature of social rules. That is to say, it would be possible to distinguish the nature of the requirements imposed by rules of social association from mores, morals or religious codes. To the extent that the rules governing social relations are no longer regarded as part of the unchangeable natural circumstances in which men are placed, attempts can be made to establish the kinds of conditions a rule would have to fulfill in order to be part of the body of social standards. A still different question may be posed as to the grounds for obedience to the rules of social association. Each of these interrelated questions suggests a different way in which the rules of social association cease to be just a collection of unrelated requirements. In other words, each question points to a way in which social rules and consequently social association itself can be considered as a self-contained unity. In short, it is in the practical

situation in which the rules governing human interaction cease to be accepted simply as part of the total natural conditions in which men are placed that it becomes possible to attempt a general or systematic account of social association. To indicate the kind of situation in which the question of an account of social association, understood as the request for the nature and basis of a self-contained system of rules, can arise is not, of course, to suggest that the question is eo ipso a legitimate one. The legitimacy of the question can be ascertained only when such an account is furnished.

Two important kinds of systematic accounts of the nature and basis of social association can be distinguished. The two basic schemas of accounts of social association may be termed the substantive and formal account.¹ An account of social association is substantive to the extent that social rules and the conduct that they require are justified by appeal to a specific or definite end. Acceptance of a social or legal rule and the conduct it prescribes would be determined by whether it would promote attainment of the substantive aim or end of human interaction. What is significant about this form of accounting for the basis of our

¹For the distinction between the substantive and the formal, with a somewhat different significance than that attached to it here, see Max Weber, On Law in Economy and Society, trans. E. Shils and M. Rheinstein (New York: Simon and Schuster, 1967), pp. 61-64. See the comments on the distinction by M. Rheinstein in his introduction to this edition of Max Weber's work, pp. xxxix ff.

acceptance of social association is the exclusive focus it places on the substantive features of the constitutive rules of the social and the conduct they require. Accordingly, the simple fact that social association is conceived as having been designed for the realization of an end does not mean that the resulting account of the social is thereby of the substantive kind. For example, if the general justifying aim of social association is taken to be the realization of all possible ends, the aim of social association would not have any determinate limitations allowing us to establish the specific kinds of actions essential to secure the given aim. To serve as the basis for a substantive account, the justifying aim of social association requires a determinate or material content. In terms of the determinate or material features of what is taken to be the natural end of human association, the set of specific characteristics that an action or its outcome would have to possess in order to be a justified course of conduct within society can be decided. What is distinctive about the substantive form of account is not that it pictures society as having a natural end; instead, it consists in the fact that the proposed end of society has a determinate or material content which serves as the principle of justification in our acceptance of social rules and social association as a whole. In order that the natural end of social association may be employed as the determinate or material principle justifying social asso-

ciation, it need not be natural in the sense that the natural is opposed to that which is moral or religious. If acceptance of social association is seen to depend on the conformity of its rules to a religious or moral code specifying what ought or ought not be done in society, the resulting account would be substantive in the required sense. For in this case as well, the justification of social rules and the conduct they require would be based on the specific kinds of actions they are, or the nature of the results they would yield that are essential to the fulfillment of the principles of the given code. In short, an account of social association would be substantive insofar as the basis for acceptance of the constitutive rules of human interaction requires reference to the specific kinds of actions prescribed or the particular kinds of outcomes that would result from their performance.

The formal model of accounting for social association is distinguished from the substantive kind by the fact that, within it, justification does not require appeal to some justifying aim of social association. Consequently, under a formal account, the justification of social rules does not rest either on the specific quality of the actions they prescribe or the characteristics of the objects of such actions in virtue of which they can be seen to conform to the determinate features specified in the justifying aim of social association. But if a formal account rules out reference to

the determinate characteristics of a justifying aim of social association and the specific nature of the actions whereby they conform to the material requirements of the given end, what then is to be taken into consideration in the acceptance of social rules and the conduct that they require? The elements that enter into a formal account can be indicated if we consider the circumstances in which justification may be demanded for a claim made upon us in social association although there might be no question as to the nature of the action required or the consequences that would result from its performance. The demand for this kind of justification can arise in the situation in which what is in question is the entitlement or authority of the person or office advancing the claim. The general significance of the nature of the request for justification and the basis of justification in these circumstances is that it does not require reference to the determinate features of the end of social association, or the specific characteristics of the individuals or their actions. Instead, the distinctive character of the formal account of social association is that justification of the rules as well as the conduct they require, the roles they confer and the duties they impose depends on the structure of the relations among the individuals engaged in interaction.

Certain features of the manner in which the distinction between the substantive and formal accounts has been

drawn should be noted. The distinction between the two models of justification is itself of a formal kind. In the characterization of the substantive account, it has been noticed that justification proceeds by reference to the determinate characteristics of the aim of social association and the specific features of the social actions and their results in virtue of which they are in accordance with the demands of the given end. But to characterize the substantive account in this way is to leave open all questions with respect to the content that is to be attributed to the ends as well as the actions and the results they yield. Similarly, the formal account has been defined as the attempt to justify the demands made upon individuals in joint action by reference to the structure of the relations themselves. Once again, by this characterization, the nature and basis of the relations between individuals is left undecided. In both cases, therefore, the distinction between the substantive and formal accounts is drawn apart from the particular content attributed to the substantive features, and apart from the character and basis of the structure of the relations. The point of the distinction is, therefore, not to isolate the kinds of reasons drawn upon to justify demands within social association, but to identify the form justification assumes in social association.

The nature of the distinction can be seen in another way. It might appear that the two kinds of justification of

social association are mutually exclusive. But it can be seen readily that both kinds of justification are appealed to in social association. Demands to act or not to act in a certain way in society may be supported with reference to the specific nature of the acts, the definite characteristics of the ends or objects of the actions, or the determinate features of those whom the performance or non-performance of the action would affect. On the other hand, justification of actions carried out with reference to the structure of the relations between the parties may be seen in the situation in which the demand is accepted or rejected on the basis of the entitlement or authority of the person or office making the demand. The point of the distinction between the substantive and formal accounts is not, therefore, to suggest that the set of considerations focused by one or the other of these two models is the only one that bears upon justification in social association. The set of considerations emphasized in each of these accounts can be drawn upon in justification of particular cases. Instead, the distinction draws attention to the possible ways in which justification can be given to the rules of social association and the demands they place upon us when these are taken as a whole. Both models are attempts at providing a general account of how the justification of the claims of social association as a body can be made intelligible. Thus, neither account is to be understood as directed to the question of the content

of the reasons that are summoned in justification of the demands within social association; instead, both models are addressed to the question of how the structure of justification can enter social association in the first place.

II. The Substantive Account and Its Systematic Dissolution

In what follows I shall examine the most important and persistent accounts of the substantive kind: the doctrine of natural law. The nature of the examination shall be systematic in the sense that I shall be concerned with the natural law doctrine as the most developed version of the substantive account and, therefore, as providing rich ground for the assessment of the substantive model. The characterization and critique of natural law is, therefore, not historical in any important sense. First, the examination is not historical in that I do not attempt to establish the merits and demerits of the particular formulations that the doctrine has received. Different possible formulations of natural law will be considered only insofar as they shed light on the general question of a substantive account of social association. Second, no effort will be made to assess the historical importance of the natural law doctrine consisting in the set of persistent questions regarding social association that have been brought to the fore in this tradition of social and political thought.²

²For a historical treatment of natural law along

The only questions to be considered are those that arise in connection with furnishing a substantive account of social association. Finally, I do not propose to take up those doctrines historically advanced as natural law theories and which employed much of the vocabulary of the natural law doctrine but were not aimed at providing a substantive account of social association.³ It is one of the complexities of the natural law doctrine that many of its traditional exponents employed the language of the tradition but gave it a meaning which was quite contrary to the principles of the tradition. And one of the important objects of their critique was the substantive character of the justification given to social association under the natural law.

It is a central contention of the theory of natural law that, in addition to the positive laws governing social association, there are certain principles governing what ought or ought not to be done in social association. These principles are the standards in terms of which the existing

these lines, see A.P. D'Entreves, Natural Law (New York: Harper Torchbooks, 1961).

³The most striking and important cases of the usage of the concept of natural law to refer to principles that are not substantive is to be found in Hobbes and Hume. As we shall see at a later stage, Hobbes uses the term "natural law" to refer to formal principles governing social association. Similarly, Hume, in his celebrated critique of the idea that there are principles of justice that are given by nature concludes: "tho' the rules of justice be artificial, they are not arbitrary. Nor is the expression improper to call them Laws of Nature; if by natural we understand what is common to any species, or if we confine it to mean what

rules in social association are to be justified. The most important common feature of the principles regarded as standards and the positive laws governing human interaction consists in the fact that they are both rules or laws. But the distinguishing characteristics of the principles of natural law in virtue of which they serve as grounds of justification for the demands placed upon us by positive laws can be seen by reference to the manner in which they are natural. In fact, the distinctive way in which natural law is law-like is related to a distinct way in which it is natural. And it is in the relation between its formal and substantive aspects that we can see the systematic difficulty of the concept of natural law.

An important sense in which the natural law is general or formal is held to consist in the fact that it gives rise to principles regulating the interactions of men which are invariable with respect to the demands placed upon men in different times and places, and with regard to what men might desire or do.⁴ Once we have a knowledge of the

is inseparable from the species." David Hume, A Treatise of Human Nature, ed. L.A. Selby-Bigge (Oxford: The Clarendon Press, 1965), p. 484.

⁴For this characterization of the generality of the natural law, see for example Cicero, De Re Publica, trans. C.W. Keyes (London: Loeb Library, 1928), Bk. III, XXII. St. Thomas Aquinas, The Summa Theologica of St. Thomas Aquinas, Part II (First Part), trans. Fathers of the English Dominican Province (New York: Benzigen Brothers, 1915), Q. 91; Ar. 1, 2, 3.

invariable principles of natural law, we are in a position to establish whether the duties and obligations imposed within existing societies are right or wrong with reference to these standards. This view of the generality of natural law as furnishing invariable standards governing the interactions of men draws its plausibility from its resemblance to a conception of the invariable uniformities of nature. The assimilation of the invariable standards governing societal conduct to the invariable uniformities governing natural happenings is, in turn, dependent on a highly special analysis of the natural domain itself.

Under the classical analysis of nature, all the phenomena are seen as falling into a variety of natural kinds. According to the classification of things under natural kinds, among the various characteristics, processes and functions of a thing, a certain set of these can be distinguished from the rest and are to be regarded as its defining features. These defining features of the object are natural in contrast to the sorts of characteristics that are peculiar to the particular thing or its contingent relations to other kinds of objects. The important sense in which the defining features of the object are natural is that without these it would not be the sort of thing that it is. Further, the defining characteristics of a particular thing in virtue of which it is a thing of a certain kind are the characteristics of a natural class of things. An account of nature

would, therefore, consist in a discovery of those substantive characteristics in terms of which the variety of phenomena belong to classes of kinds of things by nature.

But the normative import of the theory of natural kinds is to be seen in its combination with the teleological view of the universe. The teleological account enters into the theory of natural kinds insofar as the functions, processes and activities of the varieties of things are seen as various efforts at the full realization of the kinds of objects they are by nature. Thus, to understand the different processes undergone by a certain thing is to determine how they tend to fulfill the function that is pre-assigned to the object by nature. Since a description of what a particular thing is or does is carried out in accordance with what is its natural or proper end, the account of what it is or does consisting in the ascription of material properties is inseparable from the account of what it ought to be or do. To set out the uniformities or regularities governing natural occurrences is, therefore, to determine the normative standards governing what ought or ought not to happen.

Since man is taken to be part of this natural order, the general conception of nature finds a straightforward application in the human realm. Aside from the contingent features that man has in common with other kinds of creatures and the characteristics he possesses and the functions he

performs that are the outcome of human convention, there are certain defining attributes which are distinctive of man as such. The defining attributes of the human kind are general in the sense that they are ascribable to the class of men and are, therefore, drawn in abstraction from the properties peculiar to particular men. The characteristics common to all men are natural for without them there would not be the sort of creature designated as man. Further, to know the substantive characteristics definitive of the human kind is to know the distinctively human function that men have to perform in order to realize the ends specified in the definition of what man is by nature. Thus, just as there are invariable regularities that a thing has to follow in order to be the sort of thing that it is, there are invariable principles of conduct that men ought to follow if they are to realize the functions or ends set to them by nature. The rules governing men in existing social associations are to be justified by reference to these invariable principles specifying what is to be done in order to fully actualize the substantive characteristics that are antecedently established as the meaning of what it is to be truly human.

This account of the basis of our acceptance of the rules governing the social as a body of substantive principles directing us to the distinctively human end draws its plausibility from the fact that it is presented within a comprehensive view of the universe in which the human order is

seen to be one part. If the entire universe is governed by principles which prescribe what different things must do in order to attain their distinctively proper end, then it would be natural to regard the principles governing the actions of men as prescriptions stating what ought or ought not to be done to fulfill the substantive requirements of the uniquely human goal. But the basic principles of the classical conception of nature no longer play an important role in the analysis of nature prevalent in modern science. According to modern science, nature does not present itself as an order divided into a variety of different kinds of things. Accordingly, the distinction between the real features of a thing without which it would not be the sort of thing that it is and its contingent characteristics is not to be found established in the things themselves. This is not to suggest, of course, that distinctions are not or cannot be drawn between the various attributes of things, but that any distinctions to be made are not built into the very nature of things simply awaiting discovery by the natural scientist. Events and processes undergone by a thing cannot, therefore, be analyzed as so many efforts at realizing the kind of thing it is. Instead, the events and processes of nature are examined to see if they conform to certain regular connections. These regular connections are not in any straightforward sense part of the events and processes. There is, therefore, no possibility of regarding

the regularities of the happenings of the natural order as furnishing clues as to the regulations that things would have to comply with in order to fully realize their nature. Instead, the regularities in terms of which natural phenomena can be regarded as an organized structure have to consist of intelligible concepts and self-consistent principles from which results can be deduced in accordance with certain rules. The direct connection with what is emerges insofar as these regularities in terms of which the phenomena are organized enable us to predict events that will happen. Thus, the theory of natural kinds and the theory of natural teleology, presupposed by the classical conception of nature, do not enter into the modern account.

But even if the analysis of nature offered in modern science is taken to be decisive against the classical conception of nature, this in itself would not show that the view that men's actions are governed by substantive principles, presented as part of the general conception of nature, is mistaken. At most, giving up the conception of nature accompanying the doctrine of natural law would mean the loss of one source of support for the theory concerning the grounds for acceptance of the rules of human interaction. In general, the view that the interactions of men are governed by invariable principles prescribing what men ought or ought not to do to realize the substantive characteristics of their pre-assigned end can be disengaged from the compre-

hensive view of which it was taken to be one, albeit significant, instance. And it is to an examination of this aspect of the doctrine that I shall now turn.

The first difficulty with the doctrine of natural law that there are certain invariable, substantive principles prescribing what men ought or ought not to do to realize the requirements constitutive of their natural end is of a very obvious sort. There is no simple way of determining those substantive characteristics that are definitive of man's nature or end. If, however, we resort to tautologous formulations such as "man's natural end is to do what is just or right," the principles would be without any substantive content which could be employed in the justification of the duties and obligations imposed in existing societies. But even if we assume that it is possible to arrive at an end of human activity containing certain substantive characteristics, it is difficult to see how such an end would give rise to invariable principles concerning what ought or ought not to be done. If the attainment of happiness, theoretical knowledge or moral perfection is taken to be the natural end of man, it is not at all clear that there is a unique set of consistent principles that would lead to these aims. If the proper end of man can give rise to divergent and conflicting principles of conduct then natural law cannot serve as the basis for deciding what ought or ought not to be done in social association. But even if there were a way of

determining the substantive characteristics of what is man's proper end as well as the consistent principles that would have to be followed to reach this ideal, the substantive account comes up against serious difficulties.

An important problem with locating the basis for acceptance of the requirements of the rules of existing social associations on substantive principles drawn from nature is that the question that arises with the former emerges with the latter. Of any substantive end of man, even if this be given as his natural or proper end, it is sensible to ask for the grounds on which this end is to be accepted. The question that is posed is inescapable for unless we can independently establish that the substantive requirements of nature are right, we could not know whether we ought to follow the dictates of nature. And the substantive requirements established in nature cannot themselves be the grounds for our acceptance of the demands of nature. But if we furnish the grounds for determining whether our natural end is right, then the idea of an invariable end which is an independent object of knowledge that we discover and attempt to realize makes no sense. In other words, if the only way to decide whether any given substantive end is right or wrong is through criteria or standards of our own choice, then the concept of a pre-established substantive end that is to serve as the criterion or standard of what we ought or

ought not to do is unintelligible.⁵ For in this case, it is not the pre-established end that determines what men ought or ought not to do; rather, it is men who determine what ought or ought not to be their end.

It is central to the theory of natural law and any other substantive account of the nature and basis of social association that the ends of man are given to us pre-valued. That is to say, within substantive accounts, the substantive ends are presented as if they bore the grounds for their own acceptance. This picture is misleading. For, unless we decide on the basis on which to accept any substantive ends, all possible ends are on a par. The only difference that can obtain between them is if men are somehow conceived as being drawn or compelled to follow them. But in this case, the ends and the principles to which they give rise are not normative at all. In order to be binding the ends have to be accepted according to standards of our own choosing, in which case the idea of ends whose values are antecedently fixed has to be given up. It should be noted that it would

⁵Part of the difficulty pointed to here is due to the attempt to arrive at prescriptions as to what is right or wrong from descriptions of what is without any appeal to the subject's choice of the standards of what is right and wrong which was brought out in G.E. Moore's famous "open-question argument": Principia Ethica (Cambridge: The University Press, 1966), pp. 15-17. The further problem concerning the incompatibility between the autonomy of the individual and substantive principles of conduct discussed here is a question to which Moore did not address himself.

make no difference if the status of the substantive ends of man given in nature is taken to be one of commands or laws. It was noted above that, under the doctrine of natural teleology, nature is conceived as the source of regulations. This conception of the substantive ends of man as commands is set forth explicitly in the Christian version of natural law according to which the ends set to us by nature are the commandments of a divine authority.⁶ But in this case as well, the grounds for our acceptance of the invariable principles leading to our proper end can be asked significantly. Otherwise, the commands would have no binding force and abiding by them would be based either on the fear of the consequences to be suffered for disobedience or on the desire of the rewards to be gained for obedience. Alternatively, following the commands can be explained if they are thought of as moving or drawing us to our natural ends. What

⁶The view that the ends given in nature are issued as the commandments of god is to be distinguished from the view that what the ends are to be is subject to god's will. For an account of the conception of the primacy of the divine intellect over the divine will, see St. Thomas Aquinas, op. cit., Part I, Q 14, Ar. 4 and Q 19. The attribution of law to the will of god is the foundation of what is called the voluntarist conception of the natural law which received its first full formulation in the writings of William of Ockham. The division in the natural law tradition due to the attribution of the law to god's intellect or his will is discussed in Francisco Suarez, Selections from Three Works of Francisco Suarez, S.J., Vol. II (Oxford: The Clarendon Press, 1944), Bk. I, Ch. 5, 1-9. On the difference between those who regard god's will as being subject to the law and those who regard natural law as being subject to god's will, see Otto Gierke, The Political Theories of the Middle Ages, trans. F.W. Maitland (Boston: Beacon Press,

are given as invariable principles of conduct, whether these be commands or not, are binding only on the basis of standards of what ought or ought not to be done that are the outcome of human decision. But if the invariable principles of conduct are binding only in virtue of the authority of the autonomous agent free to determine his own ends, then the natural law idea of invariable principles drawn from the substantive ends of man that are given by nature is systematically incoherent.

It might be argued, however, that the difficulty of proceeding to invariable principles prescribing what men ought or ought not to do in social association from certain conclusions concerning their substantive end arises due to the natural character of the human end and the teleology leading to its attainment. In other words, the substantive account of social association and the perplexities to which it leads stem from the fact that the ends which men are to realize are taken to be natural. The general idea of laws serving as invariable guides to conduct that are given independently of what men might do or decide can be retained if

1960), n. 256, pp. 172-175. On the historical importance of the voluntarist tradition, see Francis Oakley, "Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition" in Natural Law Forum, Vol. 6 (1966), pp. 65-83. See also his The Political Thought of Pierre D'Ailly: The Voluntarist Tradition (New Haven: Yale University Press, 1964). On the philosophical significance of the voluntarist tradition, see Frederick A. Olafson, Principles and Persons (Baltimore: The Johns Hopkins Press, 1967), Chs. II and III, pp. 19-56.

the idea that these laws lead to the realization of ends that are natural is given up. Under this account, the invariable principles of conduct point not to actions whose performance would lead to given natural ends; instead, they direct us to actions whose performance would lead to given non-natural ends. To say that a certain action ought to be done is not to ascribe to it the property of possessing or yielding a given natural characteristic; rather, it is to ascribe to it the property of possessing or yielding a non-natural characteristic. The invariable principles determining which actions result in the realization of given non-natural ends would be the basis for accepting the demands of social association.

A problem with this view which appears to be even more difficult than in the case in which ends are conceived as having natural characteristics is that of finding out what non-natural characteristics might be, unless these are simply defined as those properties in virtue of which an action or its results are right. If these non-natural ends can be construed in divergent ways, then the principles guiding us toward these ends cannot be used as the basis for determining what we ought or ought not to do. But even if we agree that there are specific non-natural ends given to man and certain principles prescribing what ought to be done in order to attain them, it is hard to see how this view would constitute a significant departure from the substantive account considered earlier.

This view suggests that aside from the ends of men which have certain natural characteristics, there are other sorts of ends which have non-natural characteristics, and the invariable principles of interaction are those leading to the attainment of the non-natural characteristics of the given ends of man. In both the cases of natural and non-natural ends, to determine whether an action is right or wrong is to establish whether or not it has the specific characteristics definitive of the given end. The principles governing action are, therefore, based on the substantive characteristics, albeit non-natural, of the ends of man. In this case, however, the problems encountered with respect to the naturalistic interpretation of substantive ends arise once again. Whether the ends of action and the characteristics that are definitive of the ends are natural or non-natural, if the general principles which are to be the basis of deciding what we ought or ought not to do are guides to the attainment of these ends, it is difficult to see how these are principles of conduct at all. For, under this view, there are certain ends fixed or established for man, and the invariable principles of conduct direct men to the actions to be undertaken to fulfill these ends. Ends, therefore, are objects of knowledge and not objects of decision. And knowledge of them is knowledge of their substantive characteristics which provide the basis for generating principles that serve as maxims instructing us on how best

to reach these ends. In short, all human interaction takes place in an entirely pre-evaluated world within which no practical questions can arise.

But ends, whether natural or non-natural, neither issue decisions nor give rise to principles that are the basis of decisions. Ends are the sorts of things to be attained or avoided. And to know their natural or non-natural characteristics is not to have answers concerning what men ought or ought not to do. Indeed, to be confronted with ends is to be in the situation in which the problem of decision arises. Principles, on the other hand, are the basis for deciding on these ends. They are not higher or non-natural ends, or rules derived from such ends; they are instead the formal ways in which ends are selected and organized. To speak of principles as stemming from given ends, in the fashion of natural or non-natural substantive accounts, is to rule out in advance the decision or choice of the agent. And it is to account for the basis of the individual's acceptance of the claims of human interaction that principles were sought in the first place.

Aside from the conception of the formality of the natural law as yielding invariable principles of conduct considered thus far, there is another, though related, way in which the generality of the natural law may be interpreted. The generality or the formality of the natural law may be

held to consist in the fact that it is applicable to all men.⁷ That is to say, natural law is law-like in the sense that it gives sanction to those claims that are universalizable to all men. There is a similarity between the generality attributed to the law in this view and the one considered earlier to the extent that the principles governing what ought or ought not to be done in social association are invariable under both. But beyond this initial similarity, there is an important difference separating the two conceptions of the generality of natural law. If the formality of the law is to consist in the invariability of its principles simpliciter, there are certain kinds of actions that men always ought to do and other sorts of action that men always ought not to do if they are to realize their substantive end. But if only some men with specific characteristics are capable of undertaking the actions prescribed by the natural law, then the principles governing human interaction apply differently to different men. It is not the case, of course, that the interpretation of the principles of natural law as invariable necessarily dictates that

⁷For this characterization of the generality of the natural law see, for example Cicero, op. cit., Bk. I, xxxii; Bk. III, xi. Cicero, De Legibus, trans. C.W. Keyes (London: Loeb Library, 1928), Bk. I, x. The notion of law as prescribing the equality of men in the Stoic account of natural law is taken to be the single most important departure from Greek political philosophy in R.W. Carlyle and A.J. Carlyle, A History of Medieval Political Theory in the West, Vol. I (Edinburgh: Blackwood, 1930), Ch. I, pp. 8-10.

men be treated differently. Rather, under the interpretation, the equal application of the law to all men is left undecided. If, on the other hand, the generality of the law consists in its equal application to all men, the question of how the claims of men in social association are to be treated is not entirely open. Although the two interpretations of the generality of the natural law have this important difference, they share the significant similarity, characteristic of substantive accounts, that in each case the generality of the law is defined with reference to a substantive feature that men possess. And in the case in which the generality of the law is understood to mean its applicability to all men as well, the basic difficulty of the natural law doctrine arises due to the problematic relation between its formal and substantive features.

The first problem with the attempt to locate the equal applicability of the law to all men in a substantive characteristic that men possess is that it is difficult to conceive of a specific human characteristic that does not admit of degrees. With any substantive characteristics such as the capacity for virtue, knowledge or wealth, there is no difficulty in saying that some men possess it more than others. Even if it is possible to arrive at some specific attribute such as the possession of a soul or the faculty of reason that all men have to a comparative degree, knowledge of this substantive characteristic does not furnish

us with any guides as to how men are to be treated equally in social association. The problem is not just that it is hard to arrive at certain principles specifying the manner in which men are to be treated similarly from knowledge of a certain characteristic they have in common. Even if it is possible to determine what it would mean to act in such a way as to take the common characteristic into account in our social relations, this would still not enable us to decide whether men ought or ought not to be treated equally. In other words, if men have a certain characteristic in common and if there are certain forms of conduct that would acknowledge this common feature, we can still ask for the grounds on which this characteristic should be the basis for treating men equally, and the grounds for taking the conduct in accordance with the common feature as the standard in the interactions of men. But if we simply decide on the grounds on which men ought to receive equal treatment, then the basis for the equal treatment of men is not the possession of a substantive characteristic at all.

The effort at placing the basis of the universal applicability of the law to all men on a substantive characteristic that all men possess encounters difficulties even if the substantive feature in question is of a non-natural sort. If, for example, it could be established that God treats all men equally, the same basic problem emerges. For, in this case, we are left with the decision of whether or

not to follow God's way in our relations within social association. And if we furnish the grounds on which to accept God's conduct as ours, then the attribute that all men have of being treated equally by God drops out of importance in the decision of what we ought or ought not to do in social association. But the problem of accounting for the basis of our acceptance of the demands of social association is not only due to the attempt to proceed from the ascription of a substantive natural or non-natural property to a prescription as to what men ought or ought not to do without making reference to the agent's authority to decide on the standards of what is right or wrong. The fundamental difficulty of the substantive account of social association stems from the attempt to draw the justificatory principles of social association from certain substantive characteristics.

The perplexities of the substantive account cannot be avoided even if men themselves decide that the claims of all men are to be treated equally so long as this decision rests on the possession by men of certain substantive characteristics. If we decide to treat all men equally because they all possess a specific attribute, would this procedure entail an equal treatment of men? In this case, the principles governing social association would not prescribe that all men be treated equally, but that equals should be treated equally or that equal attributes be treated equally. The substantive characteristic that men possess equally would

be given value insofar as it was essential to reach some further end. Thus, the case in which men themselves decide to treat all men equally because of the possession of a certain substantive characteristic by all would be on a par with the cases in which the applicability of the law to all is based on God's decision or on a comprehensive view of the given end of man. In each case, what ought or ought not to be done in the interactions of men is contingent on some further end. The principle of equal treatment of all men cannot, therefore, be derived from some substantive characteristic of men that is essential to the realization of a given end even if the principle is the outcome of human decision. That the equal treatment of the possessors of the same substantive characteristic is not tantamount to the principle of equal treatment of men does not mean, however, that it is necessarily non-egalitarian. The substantive principle may be egalitarian if it is based on a specific characteristic that men possess in equal measure. But what is given equal consideration under the egalitarian, substantive principle are not men as such but the specific attribute that men possess that is relevant to the realization of some valued end. What is left out of account is that apart from the specific ends that men may value and the characteristics they possess essential to the attainment of these ends, they have the capacity to determine their own ends. But in this case, the authority of men to decide what they

are to be or do in social association that was to be accounted for by the principles of natural law is left out of consideration.

To summarize: it is the central contention of the natural law doctrine that acceptance of the demands of social association is to be justified on the basis of certain general principles of conduct. The generality of the principles of natural law, whether this consists in their invariability or their equal applicability to all men, is based on the substantive features of the end assigned to men or the specific characteristics they possess relevant to the attainment of the given end. But to interpret the generality of the principles of natural law with reference to certain substantive characteristics tends to rule out the decision or acceptance by individuals of the duties and obligations imposed in social association that was to be accounted for in terms of these principles. To accommodate the autonomy of the individual or the agent's capacity to determine what he ought or ought not to do in social association, the principles would have to be general in the sense that they are formulated independent of the ends that men may be given or the substantive characteristics they may possess. But to interpret the generality of the principles governing social association as consisting in their indeterminacy with respect to the specific ends of men and their particular attributes critical to the attainment of the given ends, thereby

allowing for the autonomy of men or their capacity to determine what they are to be or do, would be to abandon the substantive account of social association.

III. Autonomy and the Problematic of a Formal Account

Once the significance of the autonomy of the individual is understood, certain forms of an account of the basis of social association are ruled out. As we saw above, autonomy is a formal concept in the sense of abstracting from substantive principles of conduct. Thus, the autonomy of the individual or his capacity to determine his own ends cannot be justified by appeal to a specific capacity definitive of man's nature or a particular end that is the essence of human activity which men cannot but strive to realize. Indeed, the autonomy of the individual consists in the agent's capacity to decide what he is to be or do and thus in the affirmation that there is no specific thing which he cannot help but be or do. But to realize the formality of the concept of autonomy is not to furnish an answer to the question concerning the nature and basis of social association. The formality of the concept of autonomy only suggests that certain kinds of principles cannot be invoked as the grounds for the acceptance of the demands placed upon men in interaction. Given the autonomy of the individual, the principles governing social association can only be indeterminate, in the sense of abstracting from the substantive capacities and

ends of men. But it is as yet unclear what these principles might be. Thus, the import of the concept of autonomy is not that once it is understood, the basis for our acceptance of the demands of social association lies open to view. Instead, with the emergence of the autonomy of the individual, the temptation to rely on certain kinds of accounts of the nature and basis of social association is closed off.

The problem posed by the concept of autonomy is not just that it imposes limitations on the possible answers to the question of the basis of social association. Accounting for the acceptance of the demands of social association appears especially difficult once it is clear that the subjects whose acceptance of societal claims is in question are autonomous agents free to decide their own ends. It is plain that there is no unique set of ends that all autonomous agents decide to follow. Such harmony is not to be found even in the decisions of the single individual whose ends are often varied and conflicting. Thus, if all men are free to determine what they are to be or do, the task of coming up with binding standards in terms of which the actions required, the rules conferred and the ends set in social association are to be accepted does not appear easy. In what follows, I shall attempt a programmatic outline of some of the main questions that arise in the attempt at providing a formal account of social association that is required by the concept of autonomy. The nature and relative importance

of the problems facing a formal account of social association tends to vary with the particular significance attached to the concept of autonomy. To give due emphasis to the variety of questions that a formal account is designed to answer, I shall distinguish between two historically and conceptually important interpretations given to the idea of autonomy. For convenience, I shall refer to the two conceptions of autonomy as liberty and freedom. Depending on whether autonomy is understood as liberty or as freedom, the problematic of a formal account of social association comes to be seen in a different light.

The distinctive feature of the interpretation of autonomy as liberty is that, on this view, the question concerning the capacity of individuals to determine their own ends is seen to be logically unrelated to the question of determining their ends in their interaction with other persons. Thus, in Isaiah Berlin's formulation of the concept of autonomy as liberty or what he terms 'negative liberty,' the individual's entitlement to determine what he is to be or do is taken to be distinct from the question of "what, or who, is the source of control or interference, that can determine someone to do, or be, one thing rather than another."⁸ That is to say, if autonomy is understood as liberty, the claim of autonomy ceases to be that indi-

⁸Isaiah Berlin, "Two Concepts of Liberty" in *Political Philosophy*, ed. A. Quinton (Oxford: Oxford University Press, 1967), p. 141.

viduals are to determine specific ends to pursue in social association. Instead, the claim is that whatever demands are placed upon individuals in society, whatever ends are set for them, recognition should be given to their distinctive characteristic, namely their capacity to determine their own ends. In this way, the autonomy of individuals is seen as an end or characteristic of men that stands disengaged from the question of the basis of their acceptance of the ends set to them in their interaction.

The interpretation of autonomy as liberty is puzzling. It is hard to understand how it is that no connection obtains between the question of whether the individual is to determine his own ends and the question of who is to determine the ends of individuals in interaction. If we answer the first question by affirming the individual's capacity to determine his own ends, it would seem that we have rejected the idea that the second question is in need of an answer. Thus, the joint appearance of the claim that the individual is free to determine his own ends, underlying the doctrine of liberalism, and the claim that individuals themselves should determine the ends of their interaction, underlying the doctrine of democracy, does not seem to be a contingent fact. The only way in which the question regarding the capacity of men to decide their own ends can be clearly distinguished from the question of who is to decide the ends of men in social association is by placing a special limitation

on what it means for an agent to decide his own ends. In particular, autonomy understood as liberty does not mean that only the individual can decide on his own ends simpliciter, but that there is a particular sphere in which only the individual is free to decide on his own ends. Once the individual's capacity to determine his own ends is confined to a particular sphere, it is possible to make sense of the proposed distinction between the agent's capacity to set his ends and the ends set for him in social association, as well as of the concept of liberty formulated in terms of the distinction. Thus, if the liberty of the individual consists in his entitlement to decide what he is to be or do, where no qualifications are placed on the sphere in which he has this freedom, then the frequent characterization of the concept of autonomy as liberty as simply being negative or just requiring non-interference is either trivial and redundant or unintelligible. For if the agent is entitled to determine his own ends, then plainly no one else may set his ends for him. But if what is in question is a sphere outside social association within which the individual is free to decide his ends, the negative characterization of liberty as requiring non-interference acquires significance precisely because the question who is to decide on the ends of human interaction is left undetermined. Since what the ends of social association are to be and who is to decide upon them is turned into an independent problem through the

distinction between the two spheres, it becomes important to establish that the demands of the sphere of interaction do not interfere with the sphere in which the individual decides what he is to be or do. In short, the characterization of liberty as the capacity of the individual to determine his own ends is intelligible only if the agent's capacity to decide on his own ends is seen to be an entitlement restricted to a sphere outside his interaction with other men.

The restriction of the individual's autonomy to a private sphere outside the social, in terms of which the conception of autonomy as liberty is rendered meaningful, is not merely a change in the scope of the ends over which the individual is free to decide. It also has consequences for the significance of the concept of autonomy itself. For, if the agent's capacity to decide what he is to be or do is restricted to a realm outside his social relations, then the concept of autonomy as liberty seems to have no distinctively social or political significance.⁹ Instead, autonomy comes to mean something close to privacy. If liberty is privacy, the connection between the claim to a sphere of privacy and the individual's claim to the determination of his own ends ceases to be of a necessary sort. For although it is part of the concept of privacy that the person be free

⁹For this critique of the concept of liberty, see the discussion of Berlin in Bernard Crick, "Freedom as Politics" in Philosophy, Politics and Society (Third Series), ed. P. Laslett and W. G. Runciman (New York: Barnes and Noble, 1967), pp. 194-214.

from interference, to secure this state does not of necessity require that the person be free to determine his own ends. In fact, for the individual to have privacy, it is not necessary that he make any decisions or undertake any action at all. That the relation between the question of a sphere of privacy and the individual's entitlement to determine his own ends is not a necessary one can be seen in the fact that privacy can be justified by appeal to the substantive capacities and ends that men may have which were earlier seen to be incompatible with the formal concept of autonomy. The point is not, of course, that the interpretation of the concept of liberty as the entitlement to a sphere of privacy severs the relation of this concept from that of autonomy or the entitlement of individuals to decide on their own ends. Instead, insofar as liberty signifies only a sphere of privacy, the relation of liberty to autonomy or the capacity of individuals to decide on their own ends can be established only through the mediation of a theory.

To say, however, that the conception of autonomy as liberty does not have a distinctively social or political significance does not mean that the concept has no implications for social association. In order to be compatible with the requirements of a sphere of privacy, the demands imposed by social association have to be subject to a special restriction. Social association and the actions it requires of its members, the roles it confers, the offices it defines,

whatever else they may be, must not encroach on the sphere of privacy. The demand for a sphere of privacy does not, of course, specify the sufficient conditions to be fulfilled by the ends set in social association so that they can be accepted. Instead, the requirement of liberty is that whatever the sufficient grounds for accepting the ends of social association, one condition they must fulfill is that they do not penetrate into the sphere within which the individual enjoys his liberty. Seen in this way, the implication of the concept of liberty for the nature of social association seems to consist in the advancement of one end that is to be included among other ends set in social association. But the maintenance of a sphere of immunity places a requirement on the general nature of all the demands of social association. If the ends of social association are to be excluded from the sphere of privacy, they have to be indeterminate in a rather special way. The principles of social association have to be indeterminate, but not merely in the sense of being formulated apart from the substantive capacities and goals of men, as required by the general concept of autonomy. To be compatible with the concept of liberty, the principles governing social association may be substantive, but they must not be so definite or detailed as to determine every aspect of what the individual is to be or do. The question of what the principles are in terms of which the indeterminacy of the ends of social association is to be

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established and indeed whether there are any, is not taken up here. Unless such principles are furnished, it would be difficult, of course, to draw any consequences from the demand for a sphere of privacy for the nature of the sphere of interaction; indeed, it would be hard to decide where to draw the line between the two spheres. The point here is that if the liberty of the individual as a claim to a sphere of privacy is justified, then the implications for the principles governing social association is the limited one that they have to be indeterminate in the sense that they cannot dictate the whole range of actions to be undertaken by the individual.

An important feature of the conception of autonomy as liberty and the demand for a sphere of privacy in terms of which it is elucidated as well as its limited implication for the ends of human interaction is that it places restrictions on the significance of the concept of autonomy for the question of the basis of social association. The separation of autonomy from the social and political and its interpretation as an essential capacity of men for which a special sphere has to be reserved means that the concept of autonomy is not to be the ground for determining what ends are to be set in social association. On the view of autonomy as liberty, autonomy is not itself the basis for the constitution of a distinctively human form of association. Thus, if autonomy is conceived as liberty, the fundamental question

concerning the basis for the acceptance of the demands of social association is left unanswered. If the task of accounting for social association is to be undertaken on the basis of the concept of liberty, the first important problem to be encountered is, therefore, that of finding the principles on which the requirements of human interaction are to be binding.

The conception of autonomy as liberty, if taken to be the basis for giving an account of social association, poses another major difficulty. It was noted that the interpretation of autonomy as liberty is intelligible only if it is understood as the claim to a sphere outside social association within which the individual is free to determine his own ends. This characterization of liberty presupposes a particular analysis of autonomy that has not been touched upon thus far. Underlying the confinement of autonomy to a sphere outside the social is the view that autonomy or the agent's capacity to determine his own ends is fully realized apart from his interaction with other persons. For, unless the isolated individual can attain autonomy, it would make no sense to urge for a sphere of privacy. Otherwise, the end of privacy would have no relation to autonomy, and would have to be justified on other grounds. But if privacy and autonomy are to be related as the concept of liberty requires, then the individual's entitlement to the determination of his own ends as well as its exercise has nothing to do with his

relation to others. On this view, the claim that an individual is entitled to determine his own ends is to be elucidated without reference to his interaction with other individuals. Hence, if autonomy is interpreted as liberty, the autonomy of the individual and the entitlements to which it gives rise are natural in contrast to those capacities and rights he acquires in and through his interaction with other persons.

The attribution of autonomy to the solitary individual, underlying the interpretation of autonomy as liberty, introduces a new element into the problem of accounting for the nature and basis of social association. If autonomy and the entitlements which it allows are fully realized in each individual, then to speak of the autonomy of individuals is to speak of mutually independent agents. Once we assume that autonomy is a capacity that individuals possess independent of their social relations, it is no longer possible to take it for granted that men are engaged in joint activities in which certain entitlements are granted and obligations are required, and that the only genuine question then is how these are to be understood and justified. If all individuals are mutually independent agents, it becomes important to inquire into the very possibility of human interaction. Accordingly, on the conception of autonomy as liberty, the second important question in the problematic of

furnishing an account of human interaction concerns the existence of social association.

There are important differences separating the conception of autonomy as freedom from the conception of it as liberty and these entail a rather different understanding of the problematic of a formal account of social association. In the interpretation of autonomy as freedom, unlike the characterization of it as liberty, the autonomy of individuals is not seen as a special capacity of men that needs to be granted a special sphere in the arrangements of social association. In particular, human autonomy, or the capacity of individuals to determine their own ends is not restricted to a realm of privacy outside social association. This does not mean, of course, that privacy is excluded by the conception of autonomy as freedom. Instead, what is denied in the conception of autonomy as freedom is that privacy is the only end to which men are entitled by their autonomy, or that privacy and autonomy are equivalent. If autonomy is conceived as freedom, the problem is that of finding out whether the capacity of individuals to determine their own ends can be the basis for a system of human interaction that is binding.

If autonomy as freedom is seen as the basis for the constitution of a binding form of human association and not simply as the entitlement to a sphere of privacy, as in the interpretation of it as liberty, it might seem that autonomy

is being assigned the status of a predominant and comprehensive value. It is not the case, however, that autonomy as freedom, as opposed to its conception as liberty, entails the view that autonomy is the only or the most fundamental value. Rather, both as liberty and as freedom, although in each case differently, autonomy occupies a special place in relation to other values. On the interpretation of autonomy as liberty, the agent's capacity to determine his own ends is given a special status in the sense that it must not be interfered with whatever ends or values may be held in social association. In other words, whether the demands of social association are mutually conflicting or not, and irrespective of whether they are justified or not, they must not conflict with the agent's entitlement to an area within which he is free to decide what he is to be or do. If, on the other hand, autonomy is characterized as freedom, whatever the demands of social association, they can be justified as a body only in terms of the capacity of individuals to determine their own ends. Thus, in each case autonomy is given a special, though different, status and the difference in stress lies with the significance attached to it with respect to the nature and basis of social association.

With respect to the question of accounting for social association, the emphasis given to autonomy as freedom, in contrast to liberty, is the more challenging. For, unlike the interpretation of autonomy as liberty, its treatment as

freedom does not leave undecided the question of what the demands of social association are to be, and the grounds on which they are to be justified. Instead, since the conception of autonomy as freedom places no restrictions whatsoever on the agent's entitlement to determine what he is to be or do, it is important to see how the multiplicity of ends set in the interactions among men are to be binding on the individual. Thus, on the interpretation of autonomy as freedom, autonomy becomes the very basis for the acceptance of the demands of social association. This is not to suggest that considerations aside from the entitlements of persons to set their own ends do not arise. Rather, the point of this interpretation is that the presence of other ends and values is not to be taken for granted as in the characterization of autonomy as liberty. Instead, these ends have to be brought to terms with the capacity of men to determine their own ends. Thus, for the conception of autonomy as liberty, the first important question in the problematic of furnishing a formal account of social association concerns how the actions required, the roles conferred and the obligations imposed in human interaction are to be justified in terms of the capacity of individuals to determine their own ends.

Underlying the difference in the assessment of the relation between the capacity of individuals to determine their own ends and the ends of human interaction that is the

outcome of interpreting autonomy as liberty or freedom is an important difference in the analysis of the concept of autonomy. An important part of the conception of autonomy as freedom is a rejection of the view, basic to the concept of liberty, that autonomy is a capacity that can be attributed to the isolated individual. The autonomy of the individual and the entitlements to which it gives rise cannot be understood apart from his relations to other individuals. Thus, on the conception of autonomy as freedom, the capacity of the individual to determine his own ends is realized through his relation to others. The examination of the relation between the entitlement of men to the determination of their own ends and the ends of human interaction is not an enterprise separate from the elucidation of the concept of autonomy. For if autonomy is interpreted as freedom, autonomy itself is realized through the structure of human interaction.

The view that the autonomy of the individual understood as freedom is realized through his relationship to other individuals is not meant to suggest that autonomy is a capacity of society, a higher self or the general will.¹⁰ In this case, it would mean that the individual is truly

¹⁰Variations on this paradoxical and mistaken analysis of autonomy are examined by Isaiah Berlin under the rubric of "positive liberty." His polemic against any departures from the conception of autonomy as liberty (his "negative liberty") is based on the contention that all such conceptions arise due to the attribution of autonomy to some higher entity beyond the individual. See "Two Concepts of Liberty," *op. cit.*, pp. 149ff.

determining his own ends in accepting the ends set by the higher entity. Such an interpretation would have the peculiar consequence of denying the formality constitutive of the concept of autonomy. The significance of the analysis of autonomy as freedom is simply that the individual's capacity to determine his own ends is established through the agent's relation to other individuals similarly capable of determining their own ends. And the practice within which the autonomy of the individual is established is not in turn to be construed as the real self endowed with the attribute of determining its own ends. Indeed, the force of the conception of autonomy as freedom is to deny that autonomy can be characterized as an attribute at all, but that it is rather to be understood as the structure of a certain form of association among men.

If the autonomy of men and the entitlements to which it gives rise are realized only in a practice, the problem of the existence of social association, central to the concept of liberty, becomes unimportant to the concept of freedom. Since we are not initially confronted with mutually independent agents endowed with rights, the problem of how they can ever come into interaction does not arise. If autonomy is understood as freedom, the fact that individuals engage in joint activities can be taken for granted, and the question then would have to do with the nature and basis of their interaction. In particular, on the conception of

autonomy as freedom, the second important element of the problematic of a formal account of social association will concern the specification of the distinctive structure of the practice within which the autonomy of individuals is realized.

To summarize: autonomy is a formal concept in the sense of abstracting from substantive principles of conduct. Thus, to acknowledge the autonomy of men is to accept the fact that the principles in terms of which the demands placed upon them in social association are justified have to be formal. But the task of establishing what these formal principles might be is complicated since the concept of autonomy admits of different interpretations. Depending on whether autonomy is understood as liberty or as freedom, a different meaning is given to the capacity of men to determine their own ends. No attempt was made to assess the strengths and weaknesses of the meaning given to human autonomy as it is variously interpreted under the concept of liberty or that of freedom. Many arguments can be given in support of each interpretation. It is unlikely, however, that such arguments would be decisive. Instead, what is taken to be basic to the capacity of men to determine their own ends on each of these views is here taken for granted. The concepts of liberty and freedom have been brought into contrast only to see which concept would enable us to capture the distinctive nature of social association. The differences

in the significance of the individual's capacity to decide what he is to be or do in the two interpretations have important consequences for the problematic of furnishing a formal account of social association. If autonomy is conceived as liberty, the problematic of a formal account includes two important questions: first, on what basis are the demands of human interaction to be justified; second, how is it possible for social association to exist among mutually autonomous agents? If, on the other hand, autonomy is conceived as freedom, two different issues become central: first, can the demands of social association be justified on the basis of the individual's capacity to determine his own ends; second, what is the distinctive structure of the social association within which the autonomy of individuals is possible? The legitimacy of each interpretation of autonomy rests finally on whether those difficulties standing in the way of providing a formal account of social association can be overcome. The possibility of furnishing a formal account of social association on the basis of the conception of autonomy as liberty and on the quite different conception of it as freedom is examined in chapter II and chapter III, respectively.

CHAPTER II

THE AUTONOMOUS AGENT AND THE EXISTENCE OF A LEGAL SYSTEM

I. Introductory

What is social association? This is a fundamental question of social and political philosophy. Here, I do not propose to examine the question in its most general form. Instead, the question will be taken up subject to two restrictions. First, the attempt is not to establish the conditions for any social association. Rather, the question will be posed with respect to modern associations. In other words, the scope of the societies to be considered extends only to those possessing a legal system. In light of this limitation, the question may be formulated as: what is a legal system? The second restriction concerns the answer to the problem. All the answers to be considered in this chapter are constructed on the assumption of autonomous moral subjects. Thus, combining both restrictions, the question is: How is legal association among autonomous individuals possible?

What is the autonomous moral individual? There is much variation in the interpretations given to the idea of the autonomous subject. The grounds on which the interpretations are advanced are also varied. "Natural rights,"

"social contract," "human nature," and "rationality" are some of the terms proposed to capture the significance of autonomy. Here, no attempt will be made to assess the relative merits of the different accounts the concept has received. It will be adequate to state the minimum content of the idea. The minimum content of the idea of the autonomous agent consists in the claim that each individual is entitled to engage in any action so long as his actions do not infringe upon the liberty of other individuals to do likewise. The domain of individuals endowed with liberty is limited by the requirement that the individual possess a minimum of moral responsibility. This does not mean that the entitlement in question is the result of making a choice or undertaking an action. The moral status of the individual rests only on the capacity for choice. It is in fact a defining characteristic of the autonomous agent that his liberty is not acquired in virtue of making a choice or undertaking an action. Hence, the designation of the liberty as natural or inalienable. The inalienability or the individualism of the entitlement is seen in the contention that the individual has this right independently of his engagement with others. Since this entitlement belongs to the individual in abstraction from his social relations, it can be characterized as a liberty as distinguished from a right, which presupposes certain relations to others.

Appeals to the autonomy of the individual are made in connection with quite different questions of social and political philosophy. The various services to which the concept is put are not always distinguished, and the choice of some over others for emphasis has been a source of much dispute in the liberal tradition of political thought. In his famous essay, "On Liberty," Mill draws attention to some of the major uses of the idea.¹ A first use of the concept is to establish a sphere where the immunity of individuals from government would be recognized. The establishment of a sphere where the individual can act free from the interference of government is urged as a safeguard against tyranny, as the basis for the right to revolt against the ills of government, as the pre-requisite for values that are prized such as privacy. Proposals for democracy as a rule by the people or a majority of them are also supported with reference to the equal liberty men have as individuals standing apart from government. That these two uses of the concept are different can be seen in the fact that acceptance of one is quite compatible with rejection of the other. A realm of immunity can be established where the people are not rulers; and democratic rule does not require the establishment of a realm of immunity from governmental power.

¹J.S. Mill, "On Liberty," in The Utilitarians (New York: Doubleday, 1961), pp. 475-489. A similar analysis is given in Isaiah Berlin, "Two Concepts of Liberty" in Political Philosophy, ed. A. Quinton, op. cit., pp. 141-152.

Another use of the concept is predominant in social contract theory. Here the autonomy of the individual is not the basis for the form of government, but the source of government. Thus, it is held that although the people need not govern, owing to their original liberty outside society, they are sovereign. A fourth use of the concept was introduced by Mill in "On Liberty," where he argues that leaving individuals as wide a sphere as possible for the unlimited exercise of their liberty to action, save where their actions affect others, would lead to the greatest happiness. His aim was neither to afford protection against the power of government nor to support the claim that the people have the right to govern, nor that they are the ultimate source of government. Mill wished to argue that the situation in which each individual exercises his liberty to act outside social and political association is likely to result in the greatest common good.

The use of the autonomous individual relevant for this discussion is distinct from any of the above. The isolated individual can be used as the theoretical element in the construction of social and political systems. The liberty of the individual is said to belong to him independently of his association with others. Hence, it is held that this entitlement of the individual is primary to the entitlements he possesses in virtue of being part of a social association. The attempt, therefore, is to construct the

rich and multiple rights and obligations of the social on the basis of this primary liberty of individuals. This involves one immediate difficulty. It will be noted that the liberty of autonomous individuals is not subject to any common standards save perhaps the restraint against actions that infringe upon other persons' entitlement to act. The fundamental problem facing this use of the concept, therefore, is how mutually independent individuals can join together to form an association.

Three kinds of bonds through which autonomous agents can join in association may be distinguished.² First a way

²In drawing the threefold distinction between kinds of compliance with the law, I am indebted to Hart's distinction between being obliged and having an obligation. See H.L.A. Hart, The Concept of Law (Oxford: The Clarendon Press, 1961), pp. 79-88. According to Hart, if a man A asks B for his wallet under gunpoint and B hands over his wallet, we can describe B as being obliged into compliance. But, for having an obligation, circumstances altogether different from the gunman situation would have to obtain. Roughly, there must be social rules making certain forms of conduct the standard behavior. The demand for compliance with the rules needs to be insistent, and the social pressure against deviation should be strong. Finally, the rules requiring the conduct in question must be regarded as necessary and desirable for the maintenance of social life. My departure from Hart, which I shall attempt to show in the course of the essay, consists in the claim that the conditions set out by Hart for having an obligation do not impose obligation. Instead, they are elements that have to be included in describing what it is to be legally obliged. It is only if we believe, as Hart does, that legal validity establishes legal obligation that the reduction of compliance with the law to two kinds appears plausible. As I shall argue, legal obligation requires the introduction of further elements that Hart does not provide. Hence, three kinds of compliance with law are stipulated in this essay in contrast to Hart's two.

of making an individual act in a certain manner is to compel him to do as required under a threat. The threat can be directed to any of a number of things in which the person has an interest. Failure to act in the prescribed manner is met with the fulfillment of the threat in the form of punishment. Direction is here given to the individual by furnishing him with motives for acting in a certain way. When the liberty to action of an individual is limited through coercion or threats of coercion, the individual may be described as being obliged.

Second, an individual may do or forbear from some act out of regard for rules. Regard for the rule can have its source in a reason that the rule affords for acting in the manner that it requires. Alternatively, the individual may respect the rule because it is given under authorized procedures. In either case, the bonds placed on the individual stem from reasons of a justificatory sort. When the individual's liberty to action is limited by the fact that his actions follow a rule, he may be described as being legally obliged. The bonds among individuals imposed through an authorized procedure of rules may be termed a legal system.

Third, an individual may perform an action because he is under obligation to do so. In this case it is not sufficient that the person has a reason for acting as in the case of being legally obliged. Similarly, justification would not merely consist in showing that the action falls

under a rule issued through an authorized procedure. It must further be shown that the rule is fully justified because it is in accord with the right to action of all men and the entitlements to which it gives rise.³ When an individual's liberty is limited because his action falls under rules imposing obligation, the individual is legally obligated. The bonds established among individuals through an authorized body of obligatory rules can be described as a system of rights.

These three kinds of bonds are readily discernible in social associations. First, a law imposing unpleasant consequences for violations is threatening adherence to what it requires. Punishment which holds an important place in the coercive framework of legal systems constitutes an obliging bond. Second, an action can be justified by appeal to a social rule under which it falls. Similarly, a rule of action can be shown to be valid with reference to a general procedure under which the rule is authorized. In these cases, attention is drawn to the legally obliging force of the social. Third, an authorized rule is sometimes contested because it is unjust or because it violates a right. In this case, what is being pointed to is the element of legal obligation. There is no difficulty, therefore, in identifying

³A discussion of the nature of this right and the entitlements it entails is given at a later stage in this chapter. A more detailed examination of the concept of right is found in chapter III.

these ties in the midst of social intercourse. And the attempt in this discussion is not to find a model stipulating ways in which these familiar ties may be differently understood. Instead, the problem is to arrive at a theory which combines these familiar ties among autonomous individuals to account for the existence of a legal system. In other words, what is required is a theory that can capture the distinctive structure of social association by showing how these bonds are constitutive of the actual relations among men.

I propose to argue first, that any theory of the social that does not include all three kinds of bonds obtaining among individuals is fundamentally defective in accounting for important features of social relations; second, that it is possible to arrive at a system accommodating all three kinds of bonds among mutually independent individuals; third, that although a system meeting all three requirements can be constructed among autonomous agents, it is difficult to see how this system of rights can structure the joint activity of men in their actual relations.

The argument will be made through a critical examination of three important models of how individuals can enter into a system of social relations. All three models provide a definition of law describing the essential characteristics of the tie binding individuals to social rules. Further, all three models attempt to define the structural interconnection among legal rules. The significance of the

definitions of a legal system is twofold. First, the accounts have to do with a legal system as such. That is to say, the criteria furnished are not for this or that specific legal system. Instead, all three theories propose a formal model for the criteria of any legal system. Second, the models for legal systems are not prescriptions about how social association is to be regarded but are real definitions stating the conditions for the existence of a legal system.

In its definition of law, each model takes one of the above societal bonds as paradigmatic of the structure of the social. In each case, the theory is seen to have fundamental deficiencies forcing it to exclude important elements of our social relations that are captured by one or more of the bonds neglected. Moreover, the models for the criteria of a legal system involve a number of important difficulties. The most important of these is that none of the sets of criteria can account for the existence of a legal system.

The first model to be considered is that of law as coercive command which assigns a central place to the ties of coercion in establishing social relations among mutually independent individuals. The argument against the model of law as coercive command is that it is unable to show how other kinds of considerations can structure social relations. Further, according to this model for a legal system, the conditions for the existence of a legal system would be quite arbitrary.

The second model which can be used in an attempt to overcome the basic difficulties of the model of law as coercive command is that of law as authorized command. Although the model of authorization is designed to integrate all three ways in which individuals can stand in social relation, it singles out the element of authority as the paradigm bond of social association. Consequently, the model is unsuccessful in including legal obligation. It will be further argued that the model of authorization is burdened with perplexing difficulties such that it is unable to explain the existence of a legal system.

H.L.A. Hart's model of a legal system, drawn from The Concept of Law, is considered next.⁴ Hart's model is free from many major difficulties encountered with the other two theories. His model offers a satisfactory account of the obliging and legally obliging features of social association. However, it will be argued that Hart's model fails to integrate the element of legal obligation.

A proposal is then made as to how Hart's legal system can be transformed into a system of rights endowed with a theory of legal obligation. Once legal obligation is integrated into a legal system, it can be seen that autonomous individuals can form into a social association satisfying all three requirements.

⁴H.L.A. Hart, op. cit.

Finally, the system of rights constructed among mutually independent individuals is shown to share one of the crippling defects noticed with the previous theories. The difficulty is in seeing how individuals come to enter such a system of rights. The general problem is that although a system of rights in the abstract can be constructed on the assumption of individuals isolated from their social relations, we are, retaining the assumption of autonomous agents, unable to explain how the system can exist as part of the on-going activity among men engaged in actual social relations. By showing that a model of the social which takes its theoretical point of departure from individuals withdrawn from social relations is incapable of yielding actual relations governed by a system of rights, the ultimate purpose is to cast doubt on the initial assumption serving as the foundation for the structure of the social.

II. Law as Coercive Command

The model to be examined in this section figures most prominently in legal positivism. With respect to the law, legal positivism poses two questions. First, it asks the question of what law is. This primary task of definition answers the problem of why people comply with the kinds of rules that are regarded as law. By isolating the distinctive character of the obedience secured by law, an appropriate definition would distinguish the regularity conferred upon

the behavior of individuals by the law from that stemming from other rules of a religious or moral nature. The second question regarding law, and the one of central concern here, has to do less with the nature of law than with the relationship among laws such that they form into a system of rules. The question of whether a particular law belongs to a system of rules and what part it occupies within the system is a request for legal validation.

Although it is useful to distinguish these two questions, it is important to note the relations between them. The answer given to the first question by way of a definition of law serves to isolate those rules whose interrelation is to be established in the answer to the second question. Although it is not necessary that the elements defining the law also serve as the criteria for the validation of law, the rules admitted by the definition must not be excluded by the criteria for a legal system. A still closer relationship between the kinds of considerations can be seen in the fact that a reason for obeying a law may be just that it is part of a legal system.

The novel importance of the model of law as a coercive command is to be found in the isolation of the question of the structure of legal systems as a significant problem in its own right. The definition of the nature of law is designed to capture those elements of law in terms of which all laws could be seen as a structure. In other words, the

elements forming part of the nature of law are also part of the criteria of legal validation. The choice of limited elements gives rise to a logically simple schema answering to different kinds of questions regarding the law. The answers given under the model promise to be clear since both the definition of law and the criteria of validation purport to be testable. In terms of the logically simple model, all laws are to be uniformly explained in such a way that they can be distinctly set apart from other sorts of rules governing social intercourse. The result is a self-contained legal system within which questions regarding the law are to receive clear and distinct answers.

The Nature of Law

Laws "properly so called, are a species of commands."⁵ A command "is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire."⁶ The commands are issued by determinate superiors who can enforce compliance with their wishes. According to the definition, law is analyzed into the elements of 'authority,' 'command' and 'sanction.' To capture

⁵John Austin, The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence (London: Weidenfeld and Nicolson, 1965), Lecture I, p. 1.

⁶Ibid., Lecture I, p. 14.

some of the bolder features of societies these elements have to undergo some modification. Since it is not the case that laws are given to each individual, legal commands differ from ordinary commands in being "general in a twofold manner: as enjoining or forbidding generally acts of kinds or sorts; and as binding the whole community or, at least, whole classes of its members."⁷ Since society is not the chaos that it might be if directives were continually issued and received, laws have to be longstanding commands that are generally followed. Finally, in an independent political association the hierarchy of authorities comes to an end. The authority issuing commands to all others is a sovereign. In short, law is a longstanding, coercive command given by a sovereign to a whole people or to classes of them.

The analysis of law as the command of a superior explains the nature of the tie conferred upon individuals by the law. All members of social association are not at liberty to formulate legal rules in a way in which this is possible, for example, in arriving at heuristic rules or in inventing rules of a game. The analysis of laws as commands explains the fact that we cannot freely decide upon the rules that are to govern our social activities. By excluding the possibility of individuals arriving at different and even incompatible rules, the command issued to all is able to confer regularity upon the conduct of individuals under its rule.

⁷Ibid., Lecture I, p. 23.

The analysis of laws as commands captures the fact that most laws are imperatives or can be stated as imperatives. This is not merely a remark on the grammatical form of a law. To regard laws as imperatives points out the way in which compliance with legal rules is not optional or the object of voluntary decision. Where there is law, individuals are not free to do or forbear from some acts. Similarly, a command by a superior is not a guide for choosing between alternative courses of action. A sovereign's command rules out the legitimacy of choice between certain actions. It simply declares what is to be done. Thus the definition of law as the command of a superior explains how individuals are obliged to obey the law.

The sanctions supporting commands account for the obliging nature of law as well as for the important place assigned to punishment in legal systems. Although a command rules out the legitimacy of choice between certain actions, the choice to reject the command is not precluded. But under the given definition of law, failure to comply would be met by punishment that is attached to the command. Punishment or the threat of punishment furnishes strong motivation for following a command. Thus the punishment attending a command further explains the obliging force of the law. However, the element of punishment in the definition of law does not only serve to explain the obliging bond of the law. Even if it is known that punishment would not lead the transgressor

or others to future obedience, breaking the law does not go unpunished. Punishment is meted out even if the demands of the law that is transgressed are unimportant. The analysis of laws as commands whose disobedience is always punished provides an account for the important place of punishment in legal systems.

The Model for a Legal System

The definition of law as a coercive command furnishes an important criterion for a legal system. According to the model, there is no difficulty in determining whether a certain rule is a rule of social association. The fact that a rule is the command of a sovereign or of those delegated by the sovereign is the criterion of its validity. Although rules may be quite dissimilar in what they require, in the consequences of their observance or transgression, in the classes of individuals to whom they are addressed; they still form a unified body due to their common source in the sovereign. In terms of this single criterion, legal rules are clearly distinguished from other rules which make similar demands upon individuals and are supported by social sanctions. Thus, although moral and religious rules bear strong resemblance to laws, they do not belong to a legal system since, unlike legal rules, they are not commanded by the sovereign.

The criterion of validity for a legal system also serves to distinguish between mutually independent legal

systems. Although a rule may prevail in two different societies, it belongs to this legal system because it is the command of the sovereign presiding over this community. The model for a legal system, therefore, explains the fact that a person's obedience to legal rules does not extend beyond the legal system of which he is in fact a member. According to the account of legal validity, moral and religious associations are set apart from social associations, and an independent social association is, in turn, distinguished from other such bodies. In terms of a sovereign habitually obeyed by others, social association between individuals is a self-contained structure of legal rules.

An Appraisal of the Model of Law as Coercive Command

Under the definition of law as coercive command, obedience to legal rules is explained by the punishment supporting a command. There are three broad classes of legal rules that can neither be regarded as commands nor as having punishment attached to them.⁸ First, there are procedural rules governing the making and changing of other rules as well as the application of laws to particular cases. Procedural rules are also used as justification in all these cases. A second class of rules defines offices and institutions. Finally, there is a class of rules enabling us to enter contracts and marriages, and to make gifts, deposits,

⁸Cf. H.L.A. Hart, op. cit., pp. 26-48.

wills, trusts and other such social transactions. These distinctions are not mutually exclusive since some of the rules in each of these classes may come into use in fulfilling the tasks of the rules in the other classes. For example, a rule of procedure may be used in the definition of an office or in the administration of a social transaction.

It is difficult to see these three sets of rules as commands to individuals requiring them to perform a certain act or else face punishment. In the case of procedural rules, failure to abide by the rule does not necessarily result in punishment. If the relevant procedural rule is not observed, the activity may simply fail. In other cases, the activity may succeed, but it may be open to criticism for taking insufficient consideration of the appropriate procedural rule. To view laws defining offices and institutions as coercive commands is equally problematic. Nothing like a command need be given in the definition of an office. A plan for a new ministry of birth control may provide rules describing the kinds of questions that can come before this office as well as rules defining the scope of power at the disposal of the envisioned ministry. The rules in this proposal would define the institutions; but, no one is commanded by the rules and certainly no one can be punished for not complying with them. Similarly, rules for participation in social transactions are not coercive commands. No one is coerced to enter a marriage or a contract as such. In all these cases,

the rule is not a demand requiring individuals to do or forbear from a certain course of conduct. A person need not make use of procedural rules, rules defining offices, or rules facilitating social transactions; and the individual's abstinence from these rules does not result in punishment. The reason is that none of these laws are coercive commands that we are obliged to observe.

The difficulty in assimilating these classes of rules into the definition of law as a coercive command may be overcome if it is held that these rules are not laws at all and, consequently, the activities that they govern do not involve laws. This proposal can be found in Hobbes, who also regarded laws as commands.

For seeing there is no Commonwealth in the world, wherein there be Rules enough set down, for the regulating of all the actions, and words of men (as being a thing impossible) it followeth necessarily, that in all kinds of actions, by the laws praetermitted, men have the Liberty, of doing what their own reasons shall suggest, for the most profitable to themselves.⁹

The Liberty of a Subject, lyeth therefore only in those things, which in regulating their actions, the Sovereign hath praetermitted: such is the Liberty to buy, and sell, and otherwise contract with one another; to choose their own aboad, their own diet, their own trade of Life, and institute their children as they themselves think fit; and the like.¹⁰

The problem with this strategy is indicated by Hobbes' examples in which social activities are assimilated to other

⁹Thomas Hobbes, Leviathan (New York and London: Everyman's Library, 1950), p. 179.

¹⁰Ibid., p. 180.

activities that clearly fall outside the law. Individuals enter contracts in their capacity as legal persons, a capacity not required for decisions about food or shelter. And the definition of a legal person involves reference to laws. Unlike the decision over food and housing, entrance into a marriage or a contract creates rights and duties. Failure to meet these rights and duties can be a reason for demanding correction under the law. The proposal to deny the status of law to these classes of rules fails because the activities which they govern are only possible within the framework of legal rules.

The attempt to rescue the definition of law by trying to interpret these three classes of rules as coercive commands or by denying them full status of law attains simplicity of definition at the price of obscuring important features of social association indicated by these classes of rules. Procedural rules can serve as reasons why a rule should be a law, why a law should be changed, why a certain decision should be made in a particular case. Here the rule is not a command telling us what to do; rather, it is serving as a standard for social activity. We do not comply with the procedural rule out of the obliging force of punishment, since no punishment may result from failure to observe the rule. Instead, we are legally obliged to obey the rule since it serves as a guide for a certain course of conduct in the activity in question. The view of laws as coercive commands

rules out the manner in which we are able to critically appraise our conduct with others. Rules defining offices and institutions may also provide standards for the exercise of power in the office or institution. Moreover, the kind and range of questions that come under the offices are defined through these rules. These rules are also important in the establishment of the relations of a particular institution to other institutions, and consequently in the establishment of the relations of power in social association as a whole. To regard these rules as commands, therefore, conceals the creation, formation and exercise of power through the law. The model similarly fails to bring out the nature of social association indicated by rules used in entering contracts and marriages, and in the making of wills and deposits. We are not obliged to enter these relations out of fear of punishment. Once we choose to enter them, we create rights and duties imposing obligation on all those party to the relationship. What the model of law as coercive command excludes and what these rules point to is the capacity of individuals to structure their freedom in social relations. In all these cases, the effort to regard all rules under the aspect of coercive commands is not only unsuccessful, but also results in obscuring important dimensions of social association.

The model of law as coercive command grossly simplifies the basis of obedience to laws that are supported by

sanctions. Even in cases where punishment attaches to the law, compliance with the law cannot be explained solely or even importantly by the obliging force of coercion. It is not essential that a command issued by a person who can exact sanctions be reasonable. Nor is it essential that the person giving commands be authorized. But just these features that are inessential for the efficacy of a coercive command are essential in explaining compliance with the law. Most rules afford the grounds for acting in the manner that they require. Even if the rule itself does not furnish a basis for acting in the way it demands, the rule is obeyed because it is issued under authorized procedures. In these cases, we are not obliged to follow the rule; instead, we are legally obliged to compliance either because the rule is a good reason for conduct or because it is supported by other rules. When we are legally obliged to a rule, regardless of whether or not punishment attaches to the rule, the rule is not a coercive command but a standard for our conduct.

With some rules supported by sanctions, we are not just legally obliged to observe them. It would be odd to think that the law forbidding murder, for example, is followed only because it is authorized or because there is some reason supporting it. It would be odder still if fear of punishment were the only basis for obedience to this rule. The law forbidding murder is supported by the right to action of individuals, and its violation is therefore full

justification for punishment. If there is any right which any legal system ought to recognize, then persons are under legal obligation to obey the law providing for this entitlement. Thus, the definition of law as coercive command not only excludes rules not involving punishment, but it also reduces our obedience to laws supported by sanctions to a single kind. The reduction of all obedience to the obliging is clear in Austin. He argues:

The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation: Or (substituting expressions exactly equivalent), the greater is the chance that the command will be obeyed, and that the duty will not be broken.¹¹

By fastening on the coercive framework of a legal system, the definition of law as coercive command neglects the legally obliging and obligatory bonds of social association.

The fact that the definition of law as coercive command is unsatisfactory, is not itself a reason for dismissing the criterion for legal validity and the consequent model of a legal system. To establish whether a certain rule is a law of social association, what needs to be determined, according to the model, is whether it has been commanded by the sovereign. The first difficulty with this criterion is the problem of identifying a sovereign who is habitually obeyed but who is himself unfettered by his posits. In any legal system, there is more than one person or office endowed with

¹¹John Austin, op. cit., Lecture I, p. 16.

authority. Even if all authorities can be traced to one supreme authority under whom they all hold delegated power, it would still be difficult to arrive at one authority who is not bound by any rules. Any sovereign is bound by at least some laws. Indeed, the office of the sovereign cannot be defined without use of the law. But the model cannot allow for any laws to attach to the sovereign without abandoning the definition of law as a command. For if the sovereign is subject to command, he is no longer sovereign, and the problem arises again with whoever commands him. To avoid this regress, the analysis of rules as commands needs to be given up.

A possible way of retaining both the legally unbound sovereign who is the basis of a legal system and the definition of law as a command may be found if the members of social association as a whole are regarded as sovereign. The first problem with this proposal is that a social association is defined in terms of the system of rules governing its members. Thus, the social association cannot, in turn, be the criterion for defining a legal system. But even if we are able to define a people in terms of their territorial and cultural characteristics, the attempt to see the whole people issuing commands that they habitually obey is not free from difficulties. In order to distinguish the people in their capacity as commanding from their capacity as obeying, rules would be required to define these offices. But since

these rules would be commands, we are once again left with the task of identifying a sovereign. Making the whole of social association a sovereign body free from extraneous commands and habitually obeying its own dictates also undermines the force of the definition of law as a coercive command. If the commands are self-imposed, they seem to be without any obliging force at all. To regard the commands as given to oneself, therefore, does away with the only element which lends plausibility to the definition of law in this theory. Thus, making the whole people sovereign makes the definition of law as coercive command problematic and does not alleviate the difficulties of identifying the sovereign.

If, on the other hand, a sovereign of the required sort can be identified, the criterion would not yield a satisfactory model of a legal system. There are customary rules of social association with full force of the law but which no determinate person could be said to have issued. A law given by an authority other than the one presently in power does not lose its effect or require reissuing to secure its legally obliging and obligatory status. If the sovereign is the criterion of legal validity, rules that have legal status would be excluded from the legal system. Further, the status of rules included in the legal system under this criterion would be singularly precarious. This view suggests, for example, that when a sovereign dies, each individual is

freed from his legally obliging and obligatory ties since the structure of rules under which individuals form into association is now without its source of unity. Consequently, at least for the time until a new sovereign comes on the scene, some sort of state of nature prevails. It is, of course, never the case that all the bonds among individuals in social association disappear with the absence of an authority. In some pre-modern societies, the standards governing individuals may be abandoned with the demise of an especially strong ruler. But it would be odd to take even this moderately chaotic state of affairs as the standard as suggested by this model of a legal system. Thus, assuming a sovereign required by the model, many important laws would be excluded from a legal system; and the structural unity of the rules included would be very weak indeed.

There is a fundamental incoherency between the unity conferred on laws by a legally unbound sovereign and the various kinds of obedience to law identified in the course of the criticism of the definition of law as coercive command. According to the model, the rules governing social association are the commands of a sovereign who is free from the rules of the system. In other words, the ultimate norm giving unity to the legal system is not itself part of the legal system. But this view of the sovereign is at odds with the legally obliging and obligatory character of compliance with the laws of the system. If the commander is not

bound by any rules of the system, there is no guarantee that the body of rules he brings into existence would serve as reasonable or good guides of conduct. In other words, there is nothing about the sovereign to suggest that his commands would be legally obliging and obligatory rules. Indeed, there is no safeguard against the possibility that he would give completely arbitrary rules that are mutually frustrating or contradictory. Thus, under the given criterion for a model of a legal system, the two important characteristics of obedience to laws within the system would be left unexplained, except perhaps as a happy coincidence.

To summarize: the definition of law as coercive command captures one element of our obedience to law. Individuals comply with the law due to the obliging force of punishment. But punishment does not attach to all laws; and in the case of laws supported by sanctions, punishment is not the only or even important basis of obedience to the law. Thus, instead of making punishment a feature of the law, it would be more accurate to regard punishment as an element of legal systems. Under this view, laws would be part of the coercive framework of legal systems. The definition of law as coercive command excludes the manner in which we follow the law because it is issued under authorized procedures or because it is itself a reasonable guide to conduct. Similarly, the nature of our obedience to laws providing for rights is not explained. In short, the legally obliging and

obligatory ties binding individuals to the law cannot be included in the definition of law as a coercive command.

The model of a legal system fails because of the fundamental difficulties with the criterion of legal validity. The sovereign cannot be identified without renouncing the definition of law under the model. Assuming the required sovereign, rules generally recognized as laws would be invalid, and the rules validated under this criterion would not form the abiding legal structure constituting social association among individuals. Finally, since the existence of a legal system is explained as the arbitrary posit of a legally unbound sovereign, the legally obliging and obligatory bonds among individuals, based on the fact that the rules are reasonable and binding standards of conduct, would be left unexplained.

A satisfactory theory would have to account for the legally obliging and obligatory force of the law while providing for the manner in which these laws can form into a unified structure under which individuals form into social association. The theory to be considered next takes up just the two elements neglected under the model of law as coercive command: the legally obliging and obligatory bonds of law, and the basis of the authority serving as the condition for the existence of a legal system. The object of the model of law as authorized command is to account for the legally obliging and obligatory force of the law through an explanation of the source of authority.

III. Law as Authorized Command

An important object of the model of law as authorized command is to explain the nature of obedience to laws and the source of legal authority. Historically, the explanation of the nature of obedience to laws and the source of legal authority in terms of the definition of law as authorized command features importantly in social contract theories. Social contract theorists tended to offer this explanation as an answer to two related but quite different questions. First, they asked why rules and authorities are in fact desirable or necessary. In answer to this question, social contract theorists focused on the conditions that would prevail among autonomous individuals in the absence of rules and impartial authorities. The contractarians argued that, in these circumstances, living would be a physically and psychologically precarious affair and the requisite conditions for the desirable enterprises of industry and culture would be lacking. The answer, therefore, to this question of why rules and authorities is that their existence is prudential and perhaps mandatory. The second question is why we ought to obey rules and authority. Here, the request is for justification. What is required is an account of the legally obliging and obligatory force of rules and the validity of authority within a legal system. The distinguishing feature of social contract theory consists in the insistence

that a legal system requires justification. In the examination of the model of law as authorized command, my concern shall be with the second of these questions. In the construction of the model, I shall mainly draw on the theory of authorization advanced by Hobbes, who offers perhaps its clearest and most comprehensive formulation.

The Nature of Law

The central claim of the model of law as authorized command is that autonomous agents can be legally obliged and obligated if they enter an agreement. According to Hobbes, the agreement would be: " . . . as if every man whould say to every man, I authorize and give up my Right to governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorize all his Actions in like manner."¹² Several features of this agreement among mutually independent individuals should be noticed. The range of rights at the disposal of the authority need not be all the rights with which an individual is endowed. Which of the individual's rights are not transferable depends on the characterization of individual rights and the

¹²Thomas Hobbes, op. cit., p. 443. On 'promise,' 'consent,' 'authorization' see Thomas Hobbes, De Cive, ed. S.P. Lamprechett (New York: Appleton-Century-Crofts, 1949), III, 10, p. 36; VI, 6-9, pp. 66-68; VI, 19, p. 86. Thomas Hobbes, op. cit., pp. 110-111. John Locke, Two Treatises of Government, ed. T.I. Cook (New York: Hafner Pub., 1959), pp. 163, 169, 183, 193. Johann Gottlieb Fichte, The Science of Rights (Philadelphia: J.B. Lippincott and Co., 1869), pp. 156, 215, 218, 223-224.

hierarchical order assigned to them under different theories. These limitations on authorization do not affect the general model. Second, there is no need to specify the particular form of authorized office. It is sufficient to say that the office would be authorized with all the rights of an agent except those withheld through transfer; and, the authority would possess the power required for exercise of the right.

The consent or promise by each individual with every other to authorize someone with his right suggests an explanation for why obedience to authority and authorized law is obligatory. In giving voluntary consent or promise to transfer his right, an agent is not merely expressing his intention or predicting his future course of action. If all there is to consenting or promising were intending or predicting, failure to transfer would be cause for disappointment, but it would not furnish any ground for making claims on the individual for lapsing. A person who gives his consent or promise does not merely express his intention or his expected course of conduct, although he may, of course, imply something regarding his intentions and his future conduct. Rather, a promise or consent is just the transfer of right. And where persons have mutually transferred their word, they are under mutual obligation.

The agreement under the model consists not only in the mutual consent and promise but also in the authorization of an independent person or institution. The act of

authorization places the individual under obligation. It was noted that promising or consent is an act whereby the individual's word is transferred to another and, therefore, binds him. Authorization is the paradigm case of this form of incurring obligation since to authorize is just to transfer right. Thus, according to the model, obedience to law, by otherwise free agents, is justified because the individuals have freely chosen to place themselves under authorized rule.

The element of authorization in the model, as distinguished from the element of consent or promise, explains the obliging and legally obliging aspects of law. Unless a promise is a promise to authorize or unless it is performed within the framework of authority, breaking a promise is not breaking an established rule. In ordinary cases of promising, failure to live up to a promise cannot be corrected by appeal to an authority who can compel redress. But if the object of the promise is to authorize, the nature of the obligatory bond is altered. Transference of right implies transference of the power necessary for exercise of the right. It makes no sense to authorize someone with the exercise of a right and yet withhold the conditions necessary for its exercise. The element of authorization in the model, therefore, explains the obliging force of the law. Further, the mutual agreement to authorize creates a common authority that can be appealed to for arbitration. Authorization establishes a common procedure for making rules. Thus with

authorization, unlike simple promising, lapses can be corrected by appeal to a common authority and a common body of rules. The provisions for a coercive authorized procedure account not only for the obligatory but also for the obliging and legally obliging features of obedience to the law.

The Model for a Legal System

The model of law as authorized command provides a schema of a legal system. The mutual agreement among autonomous agents to authorize a person or office with rights is the construction of a common procedure for making and changing legal rules. To determine whether a rule is a law of a legal system we need only establish whether the rule is issued under the authorized procedure. The formal criterion of validity has the advantage of accommodating the multiplicity of rules that are part of a legal system. Rules that vary in their content, in the basis of compliance with what they require or in the consequences of following or breaking them can form part of the same legal system in virtue of being issued under the same authorized procedure. The model for the criterion of validity of a legal system clearly separates legal rules from moral and religious rules with which they share important characteristics. Only those rules that are authorized by the common procedure would be part of the legal system. An independent legal system can be

distinguished from others in terms of its authorized procedure for making rules. Thus, persons only obey the rules of an association governed by an office that they have freely authorized. According to the model, therefore, a legal system can be seen as a distinctive body of rules.

Unlike the model of law as coercive command, however, the model of authorization does not merely furnish a criterion for determining whether a particular rule is law, and how it is related to other laws. The model of law as authorized command further attempts to explain why individuals are under obligation to a legal system. Persons are obligated to a legal system because in their mutual agreement to authorize they have freely decided on the ultimate procedure for determining the rules that are to be binding among them. The concept of authorization not only explains how it is that there is obligation to a legal system, but also how obligation in social association is limited to persons standing in a determinate relationship. Accordingly, autonomous agents living under rules unified through a self-imposed procedure constitute a social association imposing mutual obligation.

An Appraisal of the Model of Law as Authorized Command

The first problem with the definition of law as authorized command is that it explains the legally obliging and obligatory force of only a limited class of rules. In

particular, the model provides only for those rules that are legally obliging and obligatory because they are issued under an authorized procedure. But the fact that a law has been issued under an authorized procedure is not the only reason for obedience to all legal rules. It cannot be the only reason for compliance with laws that we characteristically employ as reasonable guides to conduct. Nor can it be the only reason for following rules that are obligatory because they provide for rights. The theory can accommodate these rules only if the authorized procedure is seen as an ultimate rule that can serve as a premise from which all other rules are deduced, so that acceptance of the premise would be acceptance of the deductive consequences. It is, however, highly implausible that the wide variety of social rules can form into a deductive system since, in principle, anything can be the object of law. But under the model of authorization, the view of laws as a deductive system is not merely implausible; it is impossible. Authorization establishes not the rules that would ultimately govern but the ultimate source of rules. That is to say, the agreement in authorization is not on substantive rules but on the formal procedure for the adoption of rules. Since no limitation has been placed on the content of rules, there is no difficulty in conceiving of an accepted formal procedure yielding rules that cannot serve as reasonable or good guides to conduct. Here the rules would not be legally obliging or obligatory,

although the authority could oblige compliance with them. Thus the definition of law as authorized command accounts only for the law's obliging force, and in the case of rules followed out of regard for authority, for their legally obliging force as well. Laws that are legally obliging because they are reasonable guides to conduct are unexplained. And the model cannot account for legal obligation.

A possible remedy for the deficiency of the model may be found by distributing various rights among individuals that the authority cannot infringe upon in issuing rules.¹³ Alternatively, certain principles of justice could be established to govern the making of rules.¹⁴ Both these provisions can be introduced by appeal to natural law. Since both measures are not authorized, they would fall outside the law as defined under the theory. The first problem with these provisions is that they do not explain why we find laws that we obey legally obliging and obligatory. Further, we are legally obliged and obligated to rights and principles of justice only insofar as they form part of the law. So we cannot, in turn, explain the legally obliging and obligatory bond of law by reference to rights and principles of justice which themselves have this force because they are provided for by the law. Thus, the attempt to give legally obliging

¹³See, for example, John Locke, op. cit., pp. 192-193.

¹⁴See, for example, Thomas Hobbes, op. cit., pp. 126-127.

and obligatory force to the law by resort to elements which are extra-legal by the theory's definition of law fails.

The use of the jointly authorized office as the criterion of validity and justification of a legal system is also problematic. The first difficulty stems from the generality or formality of the agreement giving rise to the authorized office. Authorization is always a transfer of right. But the authorization, under the model, is not the transfer of any determinate right. Instead, in the agreement each autonomous agent voluntarily negates his freedom, leaving one individual or institution as the single artificial will over what is thereby an association of individuals. The authorization in question is, therefore, an agreement to suspend the right to action perpetually. In other words, the authorization is the transference of right as such, which constitutes the possibility of obligation. But if the authorization is just the creation of perpetual obligation, what is the source of obligation? If the answer is the authorization, which is a transfer and therefore an obligation, then the same question can be raised with respect to this obligation. If the promise to authorize is a promise to obligation, where the obligation is indeterminate, then as Hume points out: "The will has no object in which it cou'd tend; but must return upon itself ad infinitum."¹⁵ Thus, the generality of the agreement, which is necessary if

¹⁵David Hume, op. cit., p. 518n.

the procedure established is to serve as the criterion of validation and justification of the wide variety of laws, renders the establishment of the procedure problematic.

A most important difficulty with the schema of authorization arises from the individualist model of obligation that is the basis for the fundamental procedure of the legal system. Promising or consenting is a deliberate voluntary act of the individual. Only the individual can bind himself through promising or consenting. The case of obligation through authorization is similar. Although a person or office I authorize may delegate his authority thereby establishing authority over me, no one can do the initial authorizing for me. The obligation self-imposed through promising, consent or authorization is dependent on the voluntary decision of the individual. And the voluntary decision is an episode taking place at a specific datable time.

There is, of course, no difficulty in seeing consent or authorization as the basis of obligation to particular laws within a legal system. Something like the required voluntary decision takes place in the acquisition of citizenship or public office. Contracts, wills and trusts are made at specific times through the voluntary decision of individuals. There is no problem, therefore, in regarding voluntary decision as the basis of obligation to particular laws. The critical difficulty instead is in understanding

how the voluntary decisions of autonomous agents can be the condition for a legal system as the model of authorization suggests. As the basis of a legal system, the voluntary decision is not made in specific cases but by each with all. The voluntary agreement among free agents is not made within the authorized framework of a system of rules. The decision is precisely on the agreement to create an authority and the source of legal rules. Although the object of decision in authorization is radically different from the ordinary cases of decision, the nature of the decision is unaltered. The decision is voluntarily made by each individual at a specific time. Thus, in spite of the insistence by social contract theorists that they are not advancing historical claims, the model of authorization that they employ entails a historical dimension.

The historical explanation that is required to support the particular form of obligation in the authorization schema for a legal system would be quite perplexing. First, the historical account would have to give reasons why an individual would make the decision to authorize. Second, since the decision is arrived at by each autonomous agent with all, an account of the decision would have to explain why the decision is mutually made. Social contract theorists furnish the materials for an explanation of this sort.

It was earlier noted that social contract theorists asked not only why obedience to authority and law is

justified but also why authority and a system of laws is in fact necessary. The answer to the latter question is that autonomous agents living outside law and authority would exist in physically and psychologically hazardous circumstances prohibiting the pursuit of "commodious" living.¹⁶ An individual living under these circumstances would find it prudential and perhaps mandatory to make the decision to authorize. But since this decision can only be entered mutually, these intolerable conditions cannot be encountered by individuals severally at disparate occasions. To account for the mutuality of the agreement to authorize, the circumstances envisaged must be a mutually experienced "state of nature."

That the "state of nature" actually obtained among men is highly implausible. It might be argued that individuals enter a centralized legal system through experiencing the conditions approaching "the state of nature" among sovereign states or in primitive societies. This is not altogether convincing since it is not at all obvious that the kinds of circumstances envisaged obtain among states or in primitive societies. Nor is it plausible to think that a collection of autonomous individuals would enter such a decision on the strength of such experiences. Thus, the kind of historical account that would be required to support

¹⁶Thomas Hobbes, op. cit., p. 104.

authorization as the model of obligation to a legal system is not easily forthcoming.

If, on the other hand, we assume a successful historical account giving strong prudential reasons making it mandatory that autonomous agents decide upon the fundamental procedure of a legal system, the consequences for the model of authorization would be disastrous. A striking feature of the model of law as authorized command is to be found in the insistence that a legal system is in need of justification, and in the effort to furnish such a justification. But with the inescapable appeal to the historical circumstances making it mandatory that individuals authorize the fundamental procedure of a legal system, the conditions for social association lie in various prudential considerations. But, in this case, there is hardly a basis for the attachment to the obligatory bond to the ultimate authority, and even less reason for the claim that it is the sole condition for a legal system. The prudential considerations might be just as important as the obligatory bonds stemming from the consent to authorize. And if the prudential considerations are decisive, which they would have to be, they might furnish the sufficient condition for a legal system. Hume argues in an analogous case:

There is, then, no pretext of reason for founding one upon the other; while each of them has a foundation peculiar to itself. We might as well resolve the obligation to abstain from the possession of others,

into the obligation of a promise, as that of allegiance. The interests are not more distinct in the one case than the other.¹⁷

In short, if the historical account called upon to buttress the model of obligation succeeds, it ends by having the contrary consequence of undermining the element of obligation to a legal system.

To avoid the ill effects of the appeal to history, the model of authorization may be modified. This can be accomplished by either minimizing or completely eliminating the feature of voluntary decision in the consent to authorize that necessitated the appeal to history in the first place. A moderate revision would be to hold that no voluntary decision at an actual time need take place; instead, all that is required is a tacit consent to authority.¹⁸ This revision gains initial plausibility from the fact that it is not burdened with the perplexing historical dimension of the model of authorization considered initially. A measure of agreement or, at least, acquiescence by subjects to their authority can be seen in most legal systems. Nevertheless, the moderate revision is not without problems. If the revision is designed to retain the obligatory consequences of the original model, it is unsuccessful, since the source of obligation in the latter was the free decision by each

¹⁷David Hume, op. cit., p. 545.

¹⁸See John Locke's discussion on "tacit consent" in The Two Treatises of Government, op. cit., pp. 182-183.

individual to place himself under bonds. In this case, the effort in the revised schema would be the illegitimate one of securing the advantages of the original without paying the price. But even if we make allowances for the discrepancy between theoretical means and ends, an objection raised against the original model is at least as forceful against the revised schema. In the case of the person giving tacit consent to the legal system to which he belongs, the benefits he gains through membership in the arrangement would appear to be as strong, if not a stronger, source of obligation than the obligation incurred through tacit consent. The weakening of the element of voluntary decision to secure the obligation to a legal system under the model of authorization has the effect of making the element of obligation to a legal system irrelevant.

An extreme revision of the model of authorization would do away with the feature of promising or consenting to authorize, be it explicit or implicit. With mutual agreement removed altogether, the criterion for the model of a legal system would be simply a common procedure for the adoption of legal rules. Accordingly a rule would be a valid law of the system if it has been issued under a given common procedure. The first thing to notice about this radically revised model is that the ultimate rule is a criterion of validation but not a norm of justification. Through the extreme revision, the object of justifying obligation to a

legal system in the theory of authorization is lost. But even if one is prepared to make this crucial sacrifice, the abstract legal structure that survives is still problematic.

A condition for the existence of a legal system is a body of rules that are interrelated into a system. But when we arrive at such an abstract system of rules, we do not have the sufficient conditions for the existence of a legal system. A legal system exists only when the systematic body of rules actually govern the joint activities of individuals. In short, a legal system is a self-subsistent body of rules constitutive of the relations among persons. To say, therefore, as the radically revised model requires, that the criterion for a legal system is a common procedure for making rules gives us only a condition for a valid, though not obligatory, legal system. As the model stands it gives us no clues as to how individuals structure their actual relations in terms of such a legal system. The realization of the common procedure could be the act of positing by a sovereign modeled after the fashion of this office within the model of law as coercive command. But to place the sovereign at the base of the legal system would give rise to the arbitrary character of the resulting social association encountered in the examination of the model of law as coercive command. Alternatively, the existence of a legal system can be explained and the arbitrary nature of the sovereign's posit avoided, if the common procedure is voluntarily self-

imposed through an agreement among autonomous agents. This measure, however, would come up against the difficulties attaching to the voluntary decision that led to the revision of the original model in the first place. In short, the dilemma of the schema of authorization is that its account of the existence of a legal system is based on a model of obligation requiring appeal to the fictitious history of a primordial performance which, if true, would undercut the element of legal obligation to a legal system; if, on the other hand, the feature of voluntary decision is eliminated, we are left with an abstract legal system whose realization is problematic since it would be either arbitrary or the outcome of the primordial event of voluntary decision that is systematically perplexing. In either case, the existence of a legal system is unexplained.

In conclusion: the advance of the model of law as authorized command over the account of law as coercive command appeared to be in the insight that obligation to law and to a legal system calls for justification. But the examination of the definition of law as authorized command offered only the modest result that laws are legally obliging because they are issued under authorized procedures. Even this modest result is restricted in its consequence since we are legally obliged to some laws not because they are merely given by an authority, but because they serve as standards

for conduct. Even worse, the definition cannot explain compliance with laws imposing obligation.

Obligation to a legal system is perplexing under the theory because of the choice of authorization as the source of obligation to the basic decision procedure of a legal system. Since authorization is a voluntary act of an autonomous agent, the self-imposition of the decision procedure has to be explained by appeal to fictitious historical circumstances. But if we do possess a historical account furnishing prudential considerations making the voluntary decision mandatory, the resort to obligation becomes irrelevant since the case can now rest on prudential reasons. In short, the basic decision procedure of a legal system cannot be the outcome of a mutual voluntary decision by individuals to authorize, as the theory suggests.

If, on the other hand, authorization is given up and the element of voluntary decision it involves withdrawn, we are left with an abstract legal system of rules validated by a common procedure. Here the striking feature of the theory consisting in its effort to account for legal obligation would be given up. What remains is a system of rules validated by a formal procedure for rules. There are no major differences between this radically revised model and the schema of law as coercive command.¹⁹ Indeed, in order for

¹⁹The radically revised model of law as authorized command under which rules are united owing to the common

the system to exist as the structure of actual relations among individuals it would have to be arbitrarily posited by a legally unbound sovereign envisioned in the model of law as coercive command. Aside from the difficulties of the required sovereign, the object of explaining obligation to a legal system would be lost.

In the model to be examined next the problem of explaining the three kinds of compliance with law, and furnishing a schema accounting for the existence of a legal system will be examined once again. The novelty of this model of a legal system is in the rejection of the claims regarding law in the two previous models: the claim that law is a coercive command and the claim that it is a rule issued under a common procedure that is the outcome of a collective voluntary decision by autonomous agents.

IV. Law as a System of Primary and Secondary Rules

In the Concept of Law H.L.A. Hart furnishes an account that is based on a denial of the claims that obedience to law understood as command is owing either to the fact that the command is supported by coercion or that it is issued

procedure for their creation is quite similar to Kelsen's model of a legal system in which the sovereign as the basis of the positivist legal system is replaced by a basic norm. Thus, Kelsen writes: "A norm is a valid legal norm by virtue of the fact that it has been created according to a definite rule and by virtue thereof only." Hans Kelsen, General Theory of Law and State, trans. A. Wedberg (New York: Russell and Russell, 1961), p. 113. Cf: Ibid., pp. 115-118.

under authorized procedures. The first point of departure from the previous models is in his contention that there is no single element underlying all laws such that the essence of law can be captured in a definition. Instead, there are different kinds of laws, with different uses, calling for different sorts of compliance, but bearing certain family resemblances such that they can all be classified as laws. Moreover, with all of these laws, to say there is law is neither to say that a person has been compelled to follow a certain course of conduct under coercion nor that he has voluntarily decided on the guidance to be given to his conduct. Rather, to point out a statement of law is primarily to draw attention to the fact that a person's behavior falls under a rule. In his model for a legal system, Hart also rejects the idea that a legally unlimited sovereign is the condition for a legal system or that the fundamental procedure of a legal system is the outcome of a collective decision by autonomous individuals. Instead, he wishes to argue that a legal system is a cohesive yet dynamic relationship between different kinds of laws.

The Nature of Law

According to Hart, there are two major kinds of laws: primary rules of obligation and secondary rules. Primary rules serve as commands requiring individuals to do or forbear from certain acts. Failure to comply with these rules

is met with punishment. Secondary rules differ from these primary rules in not enjoining or forbidding acts. Moreover, unlike the primary rules, they are not supported by sanctions. In their varied uses, secondary rules have the primary rules for subject matter. The first kind of secondary rules are rules of adjudication defining the offices empowered to apply the primary rules to particular cases as well as specifying the conduct of decision making. The offices and persons with authority to change rules and the modes of change are defined in terms of a second set of secondary rules. Through these rules, individual members of social association are able to change their legal relations in such transactions as wills and contracts. A third type of secondary rule, and one with a different status than any of these, is what Hart calls "a rule of recognition." This secondary rule is the standard in terms of which it can be established whether a rule is a primary rule of social association. In other words, the rule of recognition is the criterion for determining whether a particular rule is valid. The special status of the rule of recognition can be seen in the fact that it is presupposed by the other secondary rules of change and adjudication.

Different kinds of obedience to laws can be explained in terms of these two kinds of rules and the relationships between them. According to Hart, primary rules are used in the justification and criticism of conduct. They are to be

distinguished from other social rules such as those of etiquette by the seriousness of social pressure for compliance with them such that the violation of primary rules is seen as ground for punishment. Primary rules are, therefore, standards of conduct, and afford grounds for punishment in cases of infraction. Thus, first, obedience to primary rules is obliging because violation of the rules results in sanctions. Second, compliance with primary rules is legally obliging because these rules serve as guides for the conduct that they enjoin. But even if these rules did not furnish reasons for acting in the way they require, under this account, they can be legally obliging. The primary rule can be legally obliging since it is supported by the secondary rule of recognition. Thus the analysis of primary rules and their relation to secondary rules explains the manner in which individuals are obliged and legally obliged to legal rules.

There are, however, certain rules of social association that cannot be regarded either as legally obliging because they are authorized by other rules or as obliging because they require individuals to do or forbear from an act or else face punishment. Among these are procedural rules governing the making, changing and abolishing of rules; rules defining offices and the nature and extent of the power they may exercise; and, rules facilitating transactions such as contracts, wills and trusts. These rules of recognition,

adjudication and change are used by officials and, on occasion, by individuals as standards of conduct. Thus, through the introduction of secondary rules, rules that would be opaque when regarded as prescriptions as to what should or should not be done by all and as grounds for punishment can now be seen to be legally obliging.

The Model for a Legal System

The significance of secondary rules can be seen in the important change in the status of the whole body of primary rules brought about through their introduction. A society governed by primary rules alone would suffer from important deficiencies in this realm of its rule-governed activities.²⁰ The rules cannot be changed with ease, and even when their introduction, transformation or abolition is generally desired, these developments will have to come about through slow and haphazard changes in the history of the group. The most fundamental changes in the primary rules owing to the legislative capacities of individuals would be absent. The rationalized application of the rules to particular cases, typical of a system that includes secondary rules, would be difficult if the prevailing rules were only of the primary kind. Indeed, the whole procedure of decision making would be surrounded with uncertainty and arbitrariness. Each of these activities, impossible or problematic in a

²⁰H.L.A. Hart, op. cit., pp. 89-96.

society with only primary rules, and possible where these are complemented by secondary rules, presupposes a rule of recognition. For as Hart points out, the major problem attending a society governed by primary rules alone is that "the rules by which the group lives will not form a system, but will simply be a set of separate standards . . . "21 And it is the rule of recognition that effects this most basic and pervasive change in the status of primary rules.

In terms of a secondary rule of recognition, primary rules can form a system with structural unity. A primary rule, whatever its origin and content, can be validated with reference to the criteria furnished in the rule of recognition. There is, therefore, no problem in determining whether a rule is a rule of law. The unity of laws would not consist in their belonging to a particular people defined in terms of the natural characteristics of territory and race. Instead, the rules would be unified owing to their formulation under procedures supported by the rule of recognition. The uncertainties surrounding adjudication and change of rules can now be avoided since the rules can be stated with relative precision with reference to the ultimate rule. Once the rules have acquired precision, legal rules can be set apart from moral, religious and other rules of conduct. In other words, the structural unity of the rules based on the rule of recognition makes an autonomous legal realm

²¹Ibid., p. 90. Cf. p. 93.

possible. The autonomy of the legal realm in turn allows for the possibility of autonomy of the other spheres such as that of morality. Finally, through the rule of recognition, the system of rules can be seen as autonomous from other legal systems. The introduction of a secondary rule of recognition, therefore, yields a self-contained legal system.

An Appraisal of the Model of Law as a System of Primary and Secondary Rules

What is left unexplained in Hart's otherwise illuminating account is the manner in which law and a legal system imposes obligation.²² Each of the ways in which, according to Hart, law secures obedience falls short of explaining how the law can be obligatory. Hart offers a forceful account of how primary rules are obliging and legally obliging owing to the fact that these rules are used as standards of conduct and as justification for meting out punishment. But the fact that a rule is obliging and legally

²²Although few writers have proposed a way whereby obligation can be included in Hart's account, many critics have pointed out that Hart fails to capture the element of obligation in the law. See for example: Richard L. Bernstein, "Professor Hart on Rule of Obligation," in *Mind*, Vol. 73 (1966), pp. 563-566; Ronald M. Dworkin, "The Model of Rules," in *Law, Reason and Justice*, ed. G. Hughes (New York: New York University Press, 1969), pp. 3-45; Lon L. Fuller, "Positivism and Fidelity to Law--A Reply to Professor Hart," in *An Introduction to Law* (Cambridge: Harvard Law Review, 1962), pp. 127-169; Roscoe R. Hill, in an article on Hart submitted for publication; William L. McBride, "The Acceptance of a Legal System," in *Monist*, Vol. 49 (1965), pp. 164-194; Marcus G. Singer, "Hart's Concept of Law," in *Journal of Philosophy*, Vol. 60 (1963), pp. 197-220.

obliging in this way does not take us far enough to see how it is obligatory. A person may accept a rule as a reasonable guide for a certain course of conduct, and regard departures from the rule as affording some justification for punishment. Yet the person may find another rule as the best guide for the conduct in question and as furnishing full justification for punishment in case of disobedience. Where the rules are only legally obliging in virtue of the acceptance they command as reasonable guides to conduct and as grounds for punishment, there is no difficulty in conceiving a situation where rules that are obligatory have not won this status. Indeed, there is no contradiction in conceiving of rules that are legally obliging in the desired manner and there being an obligation to disregard them. The reason is that for the rule to be legally obliging, it is sufficient that it serve as a reason for conduct and furnish some justification for punishment. This will not do, however, for legal obligation, since with obligation nothing save full justification is adequate. In light of this, it is not clear why Hart terms these legally obliging standards "primary rules of obligation" in spite of his attempt to carefully distinguish the obliging and the obligatory. The designation is doubly puzzling since it is not clear that anything more than being obliged and legally obliged is required with many rules, and there does not appear to be anything in what Hart says indicating that even a few of these impose obligation.

Perhaps it might be that the second sense in which primary rules are legally obliging owing to the sanction they receive from the rule of recognition also accounts for the fact that they impose obligation. This suggestion is burdened with an initial difficulty since Hart maintains that the primary rules are standards of obligation even in the limited cases where the society is without secondary rules. But even in the case of a centralized legal system, the proposal is problematic. It was noted that in a legal association the validity of the primary rules can be established by appeal to the rule of recognition. In this way, a rule that otherwise may not be legally obliging can have this force due to the fact that it is issued under authorized procedures. Nonetheless, this does not answer the question of whether the primary rule imposes obligation; it only postpones the question. What needs to be established then is whether the support of the primary rule by the rule of recognition secures obligation for the former. First, the rule of recognition is a formal rule defining the offices and institutions entitled to give ultimate sanction to all rules. It is not a substantive rule that places certain requirements on the content of the rules it admits. There is, therefore, nothing in this formal procedure to exclude rules enjoining acts that it would be obligatory not to perform. Rules that are legally obliging because they are authorized by the rule of recognition are even further removed from imposing

obligation than the rules that are legally obliging because they afford reasons for acting in the way that they require. This is clear in Hart's contention that, unlike primary rules followed by all participating in the legal system, the efficacy of secondary rules requires that only officials uphold them.²³ But even if all were to accept the rule of recognition as a standard of conduct, the obligation based on this rule is problematic because of its character of ultimacy. The rule of recognition is the only rule of which there can be no question of its validity apart from its existence. It is simply accepted. No question regarding the source of obligation, if any, under this rule can be raised without doing away with the ultimacy of the rule. In this case, resting the case of obligation under primary rules in the support they have in the rule of recognition will not do since the obligation under the rule of recognition itself cannot be established. In short, the fact that the primary rules are validated by the secondary rule of recognition does not lend obligatory force to the primary rules.

A possible analysis of the obligation imposed by the legally obliging primary rules may be found that does not require the recourse to secondary rules which did not prove fruitful. This could be effected by modifying Hart's characterization of primary rules such that the primary rules are accepted through the decision of the members of a social

²³H.L.A. Hart, op. cit., p. 114.

association. Placing the basis for obedience under these rules in voluntary decision is free from some of the difficulties which this proposal encounters in the authorization model. In the theory of authorized command, the decision does not have to do with the adoption of any particular rule but with the ultimate procedure forming the basis of a legal system. The implausibility of a collective decision to self-impose a legal system is absent when the decision concerns only particular rules. Particular legal rules are accepted and rejected at specific times, and there is no mystery in seeing this as based on decision. Nevertheless, this suggestion also comes up against difficulties.

Hart points out that in a legal system with primary and secondary rules, it is possible that none but the officials are concerned with the validity of the primary rules. The rest may simply abide by the rules in a sheep-like manner. This possibility would, of course, be ruled out if the primary rules were the object of decision by those following them. But even if this modification is acceptable, the fact that rules admitted into the system under the procedure of the rule of recognition would also win voluntary acceptance is perplexing, unless a decision had been made to be bound by the rules sanctioned by the ultimate rule of recognition. This would be tantamount to a decision on the ultimate procedure for rule-making, whose difficulties were considered above in connection with the

theory of authorization. Otherwise, the fact that the same set of rules sanctioned by the rule of recognition is voluntarily self-imposed would be a mysterious harmony. Moreover, locating the basis of obedience to the primary rules in decision makes it appear possible that legal rules could be generally disregarded by some or many of the members of social association. But the abiding character of a legal system seen in the use of legal rules as standards of conduct cannot be explained with ease if obedience to each rule is a matter of decision for each individual. In other words, there would be a fundamental incoherency between the suggested definition of law providing for legal obligation and Hart's schema of a legal system.

The absence of an account of obligation in Hart's analysis of law has negative consequences for his model of a legal system. First, it is difficult to see how a legal system whose rules do not impose obligation can itself be obligatory. Further, we saw that Hart's analysis of the rule of recognition or the ultimate rule of a legal system is that it is a rule accepted by officials as a standard of conduct. But its use among officials shows only that it is legally obliging. Even if it is held by officials as an obligatory standard for conduct, this does not mean that it is in fact obligatory. Its use as a standard by officials merely serves to show that it is a criterion for the procedure to be followed in the use of primary rules. What we have in the

rule of recognition is a procedural criterion for the conduct of officials, and the validity of rules. We do not have a norm imposing obligation on the officials using the rule, and conferring obligatory force on the rules it admits.

The manner in which the rule of recognition fails to impose obligation renders it incapable of fulfilling the important role within the model of a legal system for which it was cast. It is Hart's central contention that the difference between the pre-legal society with separate standards and a modern association with a legal system consists in the absence in the former and the presence in the latter of a rule of recognition. But if the rule of recognition is merely a formal procedure for determining which rules belong to the system and for specifying the procedure that officials are to follow in their treatment of the primary rules, the difference between the pre-legal and legal system appears unimportant.²⁴ Suppose we take all the separate standards of the pre-legal society and place them in a code and add a rule to the effect that the rules in the code are the only laws to be followed by members of the society and to be enforced by its officials. Now, each rule of the society can be validated with reference to the ultimate rule of the code, and the ultimate rule is accepted by

²⁴For this criticism of Hart's distinction between pre-legal and legal associations in terms of the rule of recognition, see Ronald M. Dworkin, "The Model of Rules," in Law, Reason and Justice, ed. G. Hughes, op. cit., pp. 3-45.

all the officials. So, following Hart, we should be prepared to say that the separate standards of the society are now interconnected into a legal system, and the transition from the pre-legal to the legal has been effected. Thus, Hart's criterion for a model of a legal system not only fails to yield a legal system imposing obligation, but it also has the unfortunate result of trivializing his distinction between pre-legal societies and modern societies with a centralized legal system.

The Model for a System of Rights

There is a way of accounting for legal obligation that would be in harmony with Hart's model of rules. The materials for this proposal are drawn from another discussion of social association by Hart whose consequences he does not explore and indeed resists in The Concept of Law.²⁵ In his essay, "Are There Any Natural Rights?", Hart wishes to isolate those situations in which the language of rights and obli-

²⁵It is especially puzzling that Hart does not explore the consequences of his ideas in "Are There Any Natural Rights?" in his book The Concept of Law since the article appeared in Philosophical Review, Vol. 64 (1955), some six years earlier than the book. His resistance to his earlier views regarding obligation can be seen in his arguments for "the wider concept of law" not requiring obligation in The Concept of Law, pp. 203-207. Further arguments on behalf of "the wider concept of law" can be found in H.L.A. Hart, "Positivism and the Separation of Law and Morals," in An Introduction to Law (Cambridge: The Harvard Law Review, 1962), pp. 90-126.

gations is used and the virtues of justice and fairness feature prominently. These are the circumstances in which these moral terms cannot be successfully replaced by other sets of moral terms having to do with duties and expressions of right and wrong and where ideals such as perfection, happiness and the common good prevail. In this distinctive use, Hart maintains that to assert a right is to say that there is justification for interference with another person's liberty.

There are two broad domains within which such claims on the liberty of others are advanced. First, there are general rights whose assertion is a claim on another's liberty of action in case it interferes with my liberty, unless his interference is warranted by an overriding claim he has on me. Second, there are special rights under which interference with another's liberty is justified owing to the relationship between individuals or their engagement in a common co-operative activity. The relationships giving rise to special rights are varied. Promising, consent, and authorization, whereby persons voluntarily entitle others to claims on their liberty, create duties and obligations characteristic of special rights. Justified interference with liberty on the basis of special rights is not limited to these broadly contractual relationships. In limited respects, under dependent relationships such as those of the paternal or feudal variety, claims on the liberty of others are made

possible. Further, in co-operative enterprises in which the imposition of common restrictions is essential for the benefits of the activity, those willing to enjoy the benefits warrant others to an imposition on their liberty. With both general and special rights then, to assert the right is to say that interference with the liberty to action of an autonomous agent is justified.

Before setting out the nature of the justification for the claims on the liberty of other persons in general and special rights, it would be useful to point out what it cannot be. All kinds of justification can be given for asserting these rights in particular cases. What we are looking for, however, is not justification that may be used in a particular case when a claim on liberty is advanced. What is required instead is a structure of justification such that the interrelationship between rights can be established. And what would be claimed for the structure of justification is not that no other kind of justification would ever come to bear in a particular assertion of a right, but that no other schema of justification could support all the cases of general and special rights. Once we have limited the requirement for justification to one capable of supporting general and special rights as a structure, certain kinds of justification would be excluded. In the engagement in a common enterprise or membership in certain relationships giving rise to special rights, claims to interference cannot be based on

the specific characteristics of the actions undertaken in these situations. No such justification is forthcoming since the specification of these relationships places no restrictions on the kinds of actions that are possible within them. Justification for all these cases giving rise to special rights is not possible on the basis of the substantive distinction between kinds of actions, since the kinds of actions in question are in principle indeterminate. The same difficulty attends the effort to justify general and special rights on the basis of the substantive consequences of actions since these, as the actions themselves, are also in principle indeterminate. Indeed to say there is a right is, in general, to exclude justification based on the kind of action or the consequences of the action. The formality of the justification required is further evidenced in the scope of the claims in special rights. In special rights, the claims do not extend beyond those who are party to the particular relationship or enterprise. Thus, justification in these cases cannot be based on the substantive characteristics of the actions or the substantive consequences of their performance. These considerations indicate what cannot serve as justification in these claim-making situations; but, if to assert special and general rights is to say that there is justification for the claims on freedom, we yet have to find a schema of justification to accommodate the structure of rights. It is to this important question that Hart furnishes the answer.

In special rights the claim on liberty is justified because men have voluntarily incurred these obligations by choosing to be party to the relationships or enterprises within which these rights are asserted. The indirect justification for special rights is, therefore, the equal right to action of all individuals, whose exercise results in these self-impositions. General rights are paradigm cases of the equal right to action of all men since what is being asserted is that, in the absence of rights to interference based on the exercise of the right to action in special rights, the person has the right to forbearance from others in his free exercise of the liberty to action shared by all. Thus, in both general and special rights, the justification for the claims on liberty is to be found in the equal right to action of all autonomous agents.

The structure of claims on liberty and the right in which they find justification bears important relationships to Hart's legal system in The Concept of Law. It was noted above that law is legally obliging because the rules serve as standards of behavior. Alternatively, a rule is legally obliging because it is issued under accepted procedures. In both cases, the legally obliging force of the rule does not have to do with the kind of actions the rule enjoins or the substantive consequences that would result from compliance with the rule. The legally obliging force of the rule is strikingly formal. Similarly, the justification in general

and special rights is formal since it does not rest on the kinds of actions or the consequences of the actions. With both special and general rights, although in each case differently, what is advanced is a justified claim on another person's liberty. In other words, the rights and obligations in special and general rights have to do with the social relations among men. Thus the relationships subject to the structure of obligations and rights supported by the equal right to action are congruent with the relationships that are subject to legally obliging rules. There is a closer relationship obtaining between the legally obliging rules and the system of rights supported by the equal right to action of all autonomous agents. The justified claims on liberty made in the assertion of special and general rights are just the circumstances in which obligation can become the object of legal coercion. The structure of obligation justified by the equal right to action of all, therefore, constitutes the structure of legal obligation.

Once we see that the structure of obligations supported by the natural right to action of each agent is just the structure of legal obligation, we can trace the specific relationships between these obligations and the legally obliging primary and secondary rules. In examining the relationship between the obliging and legally obliging force of primary and secondary rules and their obligatory force, an important point should be noticed. The claim is

not that every rule that is legally obliging is also obligatory. The legally obliging force may be all that is present and indeed necessary with some rules. The point instead is to see how obligation can ever enter into legally obliging rules when these are taken as a structure.

Discussing primary rules, Hart writes: "Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not."²⁶ It is primarily because the demands made upon us by primary rules are of this sort that Hart regards the positivist explanation of law as a coercive command strongest in connection with rules of the primary type. Now, general rights place just such limitations on an individual's liberty to action when the action may interfere with other persons' liberty. Under general rights, justified action may be undertaken to prevent a person's interference with another's liberty to action. In either case, when a general right is asserted, a person is required to do or not to do a certain action. And the demand is not merely legally obliging but is also legally obligatory owing to the equal right to action possessed by all men. Thus, the demands which are legally obliging under primary rules are just those which are legally obligatory under general rights.

²⁶H.L.A. Hart, The Concept of Law, op. cit., pp. 78-79.

Secondary rules, unlike rules of the primary type, do not require individuals to do or abstain from certain actions whether they wish to or not. Hence, the difficulty encountered in regarding them under the model of commands issued under threats. Although different secondary rules fulfill different functions, they are alike in having primary rules for their subject matter. Hence, the theory of law as authorized command is illuminating within this domain since the agreement in authorization gives rise to principles or procedures governing primary rules. Secondary rules of adjudication specify the persons and offices with authority to supply the primary rules as well as the manner in which the authority is to be exercised. Now, special rights claiming justified interference in the liberty of others owing to membership in a special relationship would account for the fact that these legally obliging rules would also be obligatory. Under a system in which the office of adjudication is elective, the obligation would arise out of voluntary authorization. In a non-elective system, the special rights would be justified through considerations of fairness whereby a person has benefited from other persons' submission to the secondary rules. Under most systems, the obligation would stem from a combination of these relationships giving rise to special rights. In all these cases, the legally obliging authority of the secondary rule would also impose obligation since membership in these relationships and

enterprises is acquired through the free exercise of the agent's right to action.

The secondary rule of change used by officials also involves similar legal obligations exemplified in special rights. The rule of change is used by individuals enabling them to transform their legal relations through entrance into such transactions as contracts and trusts. The legally obliging relationships erected under this rule are also the transactions giving rise to special rights. In becoming party to these relationships, a person forfeits his right to non-interference under his general rights and similarly acquires rights to interfere with other persons' entitlement to action. The relationships formed through the legally obliging rules of change give rise to obligations, because all those party to the relationship acknowledge the equal liberty to action of all presupposed by these relationships of right.

The obligation to the secondary rule of recognition poses a rather special problem. This rule is distinguished from all others in its characteristic of ultimacy which consists in the fact that the validity of all other rules can be established with reference to it, but its own validity cannot be determined within the system of rules. Obligation to this ultimate rule of recognition cannot be based, therefore, on prior membership in the special relationships giving rise to special rights since these relationships presuppose the

rule of recognition. What I wish to propose instead is that to be obligatory the ultimate rule of recognition must provide for the equal right of all men to action. General rights providing for non-interference on the right to action appeal directly to the fundamental right for justification. The justified interferences through special rights appeal indirectly to this fundamental right since it is in its exercise that persons freely entitle others to interference. The equal right to action, on the other hand, cannot be justified by appeal to special and general rights jointly constituting the system of rights. Unlike the special rights it makes possible, its possession does not depend on voluntary membership in certain relationships. Unlike general rights that exemplify it, it does not depend on actual or possible voluntary actions. The right is just an expression of the liberty of the individual. The designation of the equal right of all individuals as natural indicates the ultimacy of the rule providing for the right: whereas all general and special rights are justified with reference to this right, it, in turn, is in need of no justification.

The presence of a rule providing for the equal right to action of all men enables us to see the legally obligatory rules as a system of rights. Thus, where every primary rule provides for a general right and where every secondary rule provides for a special right, then with reference to the rule of recognition providing for equality

in entitlement to action, the whole body of primary and secondary rules would form an interrelated structure of rules imposing obligation. Through the introduction of the provision for equal right to action, Hart's legal system would, therefore, be a system of rights.

Once this natural right is included in the model for a legal system, the distinction that Hart wishes to draw between pre-legal and legal societies cannot be trivialized. If the distinction between a pre-legal society and a legal system is drawn in terms of a purely procedural rule of recognition, it was noted earlier that the difference between the two would be unimportant. To make the transition, all that needs to be done is to introduce a rule to the effect that the rules followed by the people in this particular society are rules of the legal system. The unity thereby introduced is based upon a definition of the people in terms of such natural characteristics as their territory or race. In other words, the whole that is created through the introduction of the procedural rule would be natural. But where the rule of recognition provides for the equal right to action of all men, the difference between the pre-legal and legal associations would be a difference in kind. For in this case the ultimate rule conferring unity over the body of rules would be a rule of freedom binding men in their capacity as free agents. Accordingly, the unity of the rules under which men form into association would be a unity of freedom.

Against this distinction between pre-legal and legal systems, it might be objected that the possibility of primary rules imposing obligation in a pre-legal society would be ruled out since the pre-legal society does not provide for the equal right of all men. The obligation, if any, in pre-legal societies would be based on various religious and non-legal moral grounds. Not all moral considerations presuppose the equal right of all men to action. An ethics of self-realization or the common good need not appeal to this natural right or indeed any right at all. On the other hand, the general and special rights asserting justified claims by an individual on others presuppose the autonomy of the individual. It is the autonomy of each man where humanity is not further specified that is expressed in the equal right of all men to be free. And it is just this right that is the basis of legal obligation. The moral consideration lacking in pre-legal societies and exemplified in the presence of rights in legal association is, therefore, the liberty of the autonomous agent.²⁷ Including the equal right to action

²⁷The distinction between obligations of right or legal obligations and other sorts of moral obligations is of much broader importance. Many writers who have recognized the equal right to action as the basis of an obligatory social association have tended to confuse this obligation with obligations of a quite different kind. For example, John Rawls in his essay "Justice as Fairness" in Philosophical Review, Vol. 67 (1958), provides a definition of justice in terms of two principles: "... first, each person participating in a practice or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and second, inequalities are arbitrary unless it is

reasonable to expect that they will work for everyone's advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all." (*Ibid.*, p. 164.) Since Rawls' two principles jointly define a just practice, the obligation to a social practice is based not only on right but also on teleological reasons of welfare and the common good. Explaining his principles, Rawls writes: "These principles express justice as a complex of three ideas: liberty, equality and a reward for the common good." (*Ibid.*, pp. 165-166.) According to S.I. Benn and R.S. Peters, the principle governing political association is one accepted by those concerned as giving equal consideration to their claims. See Chapter V in S.I. Benn and R.S. Peters, The Principles of Political Thought (New York: Free Press, 1959). See also, S.I. Benn, "Equalitarianism and the Equal Consideration of Interests," in Equality, Nomos IX, ed. J.R. Rennock and J.W. Chapman (New York: Atherton Press, 1967). The Benn and Peters thesis is that on this principle alone obligations of right as well as the quite different obligations based on teleological considerations of welfare can be taken into account. (See, for example, The Principles of Political Thought, p. 321.) Rawls explicitly combines the obligations of right and utilitarian obligations in his definition of a just practice. Benn and Peters, however, disavow the need for such a combination, and hold that the obligations of right are necessary and sufficient to accommodate all obligations. Thus both, albeit in a different way, admit the logical similarity between the two kinds of considerations. They also share the methodological claim that in giving the principles constitutive of the structure of social association, they are thereby furnishing the principles governing decision making within these practices. If the two kinds of principles are logically the same and appear jointly, as Rawls proposes, there seems to be no reason against giving primacy to claims of utility over those of right, or even against accounting for all obligations in terms of utility. (For a detailed critique of Rawls along these lines, see Robert Paul Wolff, "A Refutation of Rawls' Theorem of Justice," in The Journal of Philosophy, Vol. 63 (1966), pp. 179-190.) In Benn and Peters, it seems implausible that the principle of equality of consideration in and of itself could justify the quite opposite status of inequality, in cases where inequality promotes a greater common good. It is not surprising, therefore, that when touching upon situations of inequality, the authors appeal to "relevant grounds" for assessing claims and the relative mutual advantages that would result when differing weights are assigned to different claims. See, for example, The Principles of Political Thought, pp. 128-129. (For this

criticism of inconsistency see: Brian Barry, "Justice and the Common Good," in Analysis, Vol. 21, pp. 86-90.) But if we appeal to the common good as they do, in accounting for situations of inequality, the problems raised above with Rawls emerge. What is overlooked by these writers is the structural distinction between the two kinds of obligation. Whereas teleological considerations are made upon deciding on substantive values, the obligations of right that makes the mutual advancement of different values possible, is itself held in abstraction from any values. Under considerations of the common good; inequalities between men are justified because the relevant characteristics possessed by some make a greater contribution to the common good. Greater rights possessed by some are, therefore, held in virtue of possessing certain talents and powers. The equal right to action of all men, however, is a right held irrespective of the different talents and powers that men possess. It is a right men possess in their human capacity as such. The equally misleading methodological claim that in giving the justification of an institution one is thereby furnishing the principles for decision making within the institution underlies many criticisms of Hart's Concept of Law. A number of Hart's critics claim that his scheme of rules is inadequate for judicial decision making where moral considerations especially of the utilitarian sort are commonly taken up. This charge is doubly misdirected since first, in The Concept of Law, Hart does not set himself the task of explaining judicial decision making but the quite different one of accounting for the structure of a legal association. Thus, the relevant criticism, if it be a criticism, is that his analysis of the concept of law is incomplete. Second, the utilitarian considerations introduced by these authors do not answer the question of how the structure of legal validity can be a structure of right. Instead, the positivist scheme of legal validity is retained and moral considerations of utility enter only in the making and application of laws. If these utilitarian principles are proposed as forming part of the structure of the legal, the criticism raised in connection with the analogous strategy in Rawls and Benn and Peters apply. For critiques of Hart along these lines, see, for example: Ronald M. Dworkin, "Judicial Discretion," in Journal of Philosophy, Vol. 66 (1963), pp. 624-638. Ronald M. Dworkin, "The Model of Rules," in Law, Reason and Justice, ed. G. Hughes, op. cit., pp. 3-45. Lon L. Fuller, "Positivism and Fidelity to Law--A Reply to Professor Hart," in An Introduction to Law (Cambridge: Harvard Law Review, 1962), pp. 127-169. Lon L. Fuller, The Morality of Law (New Haven: Yale University Press, 1964). For Hart's own claim that the principles governing the structure of a practice are not the

of all men in the rule of recognition does not exclude the possibility of any moral considerations arising with rules in pre-legal societies; and it makes it possible to see the distinction that Hart wishes to draw between pre-legal and legal systems in a manner that is not open to trivialization.

To summarize: Once the proposed structure of obligations is integrated into Hart's account of law, we have come some distance toward providing an answer to the question: "How is a legal system among autonomous individuals possible?" The network of primary and secondary rules explains some of the major ties binding individuals under the law. The analysis of primary rules as standards of action and as grounds for punishment accounts for the obliging and legally obliging ties to the law without attaching coercion to all laws or distorting the characteristic use of rules as guides to conduct in the manner of the command model. The use of secondary rules as standards of behavior by officials explains how certain social rules can be legally obliging, although none are coerced to employ them. Once the equal right to action of all men is recognized, both sets of rules can be legally obligatory by giving rise to general and special rights. The obligation to law that results from the equal right to action is free from the perplexing consequences of the authorization model of obligation; and the

principles governing the activity under the practice see H.L.A. Hart, Punishment and Responsibility (Oxford: Oxford University Press, 1969), p. 10, p. 39.

insight of the model of authorization is preserved for the limited domain of obligations exemplified by special rights.

The model of a legal system as a dynamic unity between these primary and secondary rules is without many of the difficulties encountered in the two previous models. The rules form an interconnected system insofar as their validity is established with reference to the criteria furnished by a rule of recognition. Locating the foundation of a legal system in the rule of recognition avoids the difficulty of identifying the legally unlimited sovereign and the precarious unity it confers on the rules in the model of law as coercive command. Similarly, the mysterious history of a primordial performance underlying the unity of rules in the model of law as authorized command does not arise with the rule of recognition. Finally, if the rule of recognition provides for the equal right to action, this ultimate rule and the system it supports impose obligation, thereby overcoming a fundamental weakness in the models of law as coercive command and law as authorized command.

V. An Outstanding Problem: The Existence of a Legal System

An important problem encountered with the two previous models survives in Hart's schema of a legal system. Under the model of law as coercive command we saw that the condition for a legal system is the presence of a legally unlimited sovereign. Placing the condition for the existence

of a legal system in a sovereign involves certain difficulties. It would appear that the legal system resulting from the sovereign's posit which be an arbitrary imposition such that the characteristic use of legal rules as mutually accepted standards of conduct would be unexplained. Moreover, this account of the realization of a legal system involves an illicit historical dimension. To avoid the problems attending the account of the existence of social association in the definition of law as coercive command, the model of law as authorized command proposes collective authorization as the ultimate source of a legal system. Although the agreement of authorization would account for the realization of a legal system, we saw that it entails appeal to a fictitious primordial performance. But when authorization is abandoned, leaving a common procedure as the basis of a legal system among autonomous agents, it appears that the realization of the common procedure requires some office such as the sovereign, thereby re-introducing the difficulties with the model of law as coercive command. It is just this question of how a formal body of rules constituting a legal system comes to be the system of actual relations among persons that remains unresolved in Hart.

The problem of how a legal system can exist as the system of actual relations between persons is not easily discernible in Hart because his model employs both concepts characteristic of an actual legal system, and terms pertaining

to the analysis of a formal system of rules. Through the joint use of different kinds of concepts, he tends to avoid the question of the existence of a legal system that is in need of explanation. What I want to demonstrate is first, that his analysis of law admits of two alternative readings: one, as rules of actual relations; the other, as rules of a formal system and second, that his model of a formal legal system is itself based on an actual practice which is unexplained.

Hart analyzes laws as rules of practice. First, as rules of practice laws exist insofar as the conduct that they enjoin is mutually accepted or recognized as a standard governing the relations among individuals, and deviations from the standard as justification for punishment.²⁸ The existence or acceptance of the law understood as a rule of practice is shown in the manner in which men behave. Second, a consequence of the first characterization of rules of practice is that they have to be used. Since the rule is interwoven into the joint activity of individuals, the rule, once disengaged from the activity, ceases to exist. Third, to say there is a system of rules of practice is to say that there is a form of life. There cannot, therefore, be an abstract scheme or blueprint of a system of rules of practice. The elements of "acceptance," "recognition," "use" that are crucial in the elucidation of the existence of laws as rules

²⁸H.L.A. Hart, The Concept of Law, op. cit., pp. 56-58.

of practice is what Hart terms "the internal point of view."²⁹ The internal point of view characterizing the existence of laws as rules of practice is crucial for Hart's imminent critique of legal positivism, but is unimportant for Hart's own schema for a legal system.

In Hart's model of a legal system, laws tend to be regarded not as rules of practice but as rules of a formal system. First, as part of a formal legal system, the existence of a rule does not require acceptance or recognition by anyone of the conduct required by the rule. To say the rule exists in this sense means only that the rule is valid given the system's criteria of validity.³⁰ Thus, whereas to say a rule of practice exists is to say that there is agreement in behavior; to say a rule exists within a legal system means simply that there is agreement between the rule and a higher secondary rule of the system. Second, whereas a rule of practice must be used in order to exist, a rule of a formal system may exist although none may use it.³¹

²⁹Ibid., pp. 55-60, pp. 86-88. For a wider discussion of the concepts of "practice," "use," and "acceptance" see Ludwig Wittgenstein, Philosophical Investigations, trans. G.E.M. Anscombe (New York: Macmillan, 1965), #7, #23, #144, #202, #241, #325, #345, pp. 183, 226. For a discussion of "acceptance" and "existence" see J.L. Austin, How to Do Things with Words, ed. J.O. Urmson (Oxford: Oxford University Press, 1965), Lecture III, pp. 25-32.

³⁰H.L.A. Hart, op. cit., p. 107.

³¹Ibid.

Finally, to say a legal system exists in this sense is to say that there is a principle in terms of which the various rules can be interrelated. There can, therefore, be a blueprint of a formal legal system; whereas with rules of practice, there must be an actual instance of their application.

The two quite different analyses of laws as rules of practice and rules of a formal system run side by side in Hart's account. The former analysis is relied upon in his initial critique of legal positivism, and the second, which does not militate against legal positivism, enters into his own model of a legal system. Since it is his model of a legal system that is of primary concern here, it is the second of these analyses that I shall examine.

Hart's account of a formal legal system itself involves the concept of a practice. The threefold characterization of rules as part of a formal legal system all presuppose what Hart terms the rule of recognition. But Hart's account of the rule of recognition shows that it is a practice. All three characterizations of a rule of practice fit the rule of recognition, whereas the three features of a rule of a formal system do not. Thus, the rule of recognition exists only insofar as it is used as a standard of conduct by officials. There is, therefore, no question of the existence of this rule apart from its use. Hart writes: " . . . the rule of recognition exists only as a complex, but normally concordant practice of the courts,

officials and private persons in identifying the law by reference to certain criteria."³² Especially since there may be several rules of recognition all of which exist as the practice of courts and officials, this system of rules and the institutions and activities in which they are interwoven is best characterized as a practice rather than as a set of rules. Finally, there cannot be a blueprint of the rule of recognition; rather, there are officials disposing their functions in accordance with mutually accepted standards of conduct. Thus, since the rules of a formal legal system presuppose a rule of recognition which is a practice, the existence of a legal system, under Hart's own account, depends on a practice.

What Hart does not explain is how the practice of officials and institutions that he terms the rule of recognition can arise. Since this practice is the condition for the existence of a legal system, the existence of a legal system is unaccounted for unless the conditions for the practice are explained. Hart's claim that the existence of a practice in which the rule of recognition shows itself is a question of fact can only be taken as a decision that the concept of a practice does not require explanation.³³ Since Hart himself holds that the rule of recognition is made up of various laws, the existence of a rule of recognition

³²Ibid.

³³Ibid., p. 245.

cannot be just a question of fact. The contention that the existence of the rule of recognition is a matter of fact that can be established by looking is contradicted by Hart's claim that "the ultimate rule of a legal system may be in doubt . . . and courts may resolve the doubt."³⁴ What is in doubt is a question of law, and unless its resolution is arbitrary, the decision must be governed by principles. If the rule of recognition is a law and if courts pass decisions on the rule of recognition, then the claim that the existence of this rule is a question of fact is unconvincing. But if the existence of the practice that is the condition for the existence of a legal system cannot be established by observing the behavior of officials, how can the practice be accounted for?

It might be that the laws constituting the rule of recognition are posited and are subsequently put into practice by officials. This explanation is close to the account of the existence of a legal system under the model of law as coercive command. Here also the problems due to the failure to furnish justification for the original establishment of legal rules arises. Alternatively, the legal system can exist through the voluntary self-imposition of laws by officials. Since the officials themselves are defined through the law, this explanation involves circularity. Further, the difficulties of a collective voluntary decision en-

³⁴Ibid., p. 145.

countered in the model of authorization emerge in this explanation of how the rule of recognition and the system it supports come into existence.

The difficulties of accounting for the existence of a legal system are compounded once obligation is introduced into Hart's legal system. In this case, the rule of recognition is not just a formal procedure followed by officials. The rule of recognition imposing obligation provides for the equal right to action of all agents. Moreover, the general and special rights supported by the fundamental right define the practice not only of officials but also that of the general members of social association. Here the existence of the rule cannot be explained away by saying that it is implicitly recognized by individuals in light of the manifest and abundant examples in human history where the equal right of men went unrecognized through explicit assertions of inequality or through the introduction of specific characteristics deemed indispensable for admission into the community of men. Moreover, the question of how this rule comes to constitute the relations among otherwise autonomous agents cannot be answered by saying that it is posited or that it is voluntarily accepted by individuals. These problematic solutions offered by the theories of law as coercive command and as authorized command respectively are not adopted by Hart. But Hart does not offer any alternative account of how individuals form into the complex practice of

social association constituted through these legal rules. Unless the concept of a practice can be elucidated, Hart's model for a legal system remains a stipulative definition of how a legal system is to be understood, and not, as he contends, a real definition explicating the complex activity of social association with which we are familiar.³⁵

³⁵For Hart's contention that he is giving a real definition of the legal systems with which we are familiar, see H.L.A. Hart, op. cit., pp. 13-14.

CHAPTER III

THE PRACTICE OF SOCIAL ASSOCIATION

I. Introductory

In the last chapter we examined important attempts to account for the structure of social relations in terms of how mutually independent agents, or individuals outside social relations, follow social rules and become the bearers of rights. These efforts at explaining social association as a system of relations among autonomous individuals are vitiated by a major difficulty: the explanatory model of an individual following a legal rule or possessing a right itself remains inexplicable when it is taken to be independent of the social relations which this model is designed to elucidate. This systematic difficulty was shown by drawing attention to the fact that it is impossible to see how a legal system erected on the basis of autonomous agents can ever become part of the ordinary activities of men in which it has its normal setting.

It is important, however, to see what this critique is not. It is not a rejection of the idea that the complex practice of the social is susceptible of being understood as a system of interrelations. What is being rejected instead is a particular formal account of social association that is

evidenced in the three models considered. Namely, the presumption in all three models that a sharp distinction can be drawn between a legal system and the setting in human activity in which it has application is unwarranted. This does not mean, however, that the complex practice of social association governed by a legal system cannot be understood with reference to the body of principles constitutive of such a practice. It is in fact a chief contention of this chapter that the complex practice of social association can be understood as a system of relations defining the actual activities of men.

The practice of social association will be explicated in two parts. In the first of these, I shall suggest that a system of rights may be understood in terms of three constitutive principles: the concept of personality, the concept of private property and the concept of recognition. The first part of the explication focuses on the formal features of social association. I shall attempt to show that the structure of social association can be understood in terms of the conceptual relations between the ideas of personality, private property and recognition. The account is formal in the sense that it does not depend on the specific nature of the acts men undertake within a system of rights or the substantive goals they pursue in belonging to such a system. For the formal characterization of the practice of

social association, I shall mainly rely on Hegel's discussion of "Abstract Right" in The Philosophy of Right.¹

In the second part, I shall attempt to show how the system of rights constituted through the principles of personality, property and recognition can have a footing in the lives of men. This will be a material account identifying a definite human activity with substantive goals in which men engage in virtue of belonging to a system of rights. The material account, therefore, points to a specific human activity in which the formal structure of a system of rights shows itself. For the characterization of the material aspect of the practice of social association, I shall draw mainly upon Marx's discussion of "value" in Capital.²

The relation between the formal and material aspects of social association has a twofold significance: first, there is a human activity that is governed by the formal relations of right; second, the formal system of rights exists by finding application in the real activities of men.

¹ George Wilhelm Friedrich Hegel, Hegel's Philosophy of Right, trans. T.M. Knox (Oxford: The Clarendon Press, 1952), Para. #34-#104.

² Karl Marx, Capital: A Critical Analysis of Capitalist Production, Vol. I (Moscow: Progress Publishers, 1966), Part I, pp. 35-142. For other extensive discussions of the concept of value see Karl Marx, Theories of Surplus Value, Volume IV of Capital, Part I and II (Moscow: Progress Publishers, 1969), see especially Chapters III and X. Karl Marx, Grundrisse der Kritik der politischen Oekonomie (Berlin: Dietz Verlag, 1953).

In the relations between the formal and material aspects, social association exists as a complex practice among men.

II. The Practice of Social Association: The Formal Structure

Before embarking on an analysis of the formal structure of the complex practice of social association, it may be useful to open with some general remarks on the nature of a practice. These remarks are intended to indicate why, in general, a practice can be understood in terms of its structural characteristics. A practice is an activity that is governed by rules. More complex practices include offices and institutions that are defined by rules of the practice. It is a defining mark of a practice that within it certain forms of conduct are regarded as standard behavior in the activity in question. That is to say, fundamental principles of the practice and the behavior they prescribe are accepted as requiring no justification. In view of this, an important way of understanding a practice is to see what is taken for granted within it. Alternatively, a practice may be understood by drawing attention to the fact that if certain standards are not used as a matter of course, that form of activity would break down.

These characteristics of a practice indicate why a certain type of explanation is bound to miss what is significant about it. A practice cannot be satisfactorily described as a set of rules backed by a second-order set of rules

explaining and justifying the use of the former. This may be useful in helping a person to learn how to take part in a practice. But even in this case, what counts as success in the final analysis is when the person uses at least some of the rules as a matter of course in the practice in question. And no rules can succeed in having a rule and the behavior it requires to be taken for granted. The dependence of a practice on use shows that a practice cannot be adequately described as a body of rules with principles for its application. With any practice, even of the simplest sort, it is impossible to define all the specifics of the context within which the rules are used as a matter of course. One way in which this can be seen is that it is difficult, except in a very rough and general way, to determine in advance the specific ways in which a practice may fail. But the determination of a practice or its dependence on a complex setting is precisely that which makes certain kinds of specific characteristics of the practice a matter of indifference.

The determinacy of a practice, consisting in the fact that we cannot in advance have a blueprint specifying all the particular circumstances under which it can exist, should not obscure the quite formal characteristics of a practice. It was noted above that it is a mark of a practice that where it obtains, certain forms of conduct are recognized as the standard. The acceptance of a standard, in turn, rules out certain indeterminate aspects of conduct. Once a certain

form of behavior is accepted as the standard, it is not, for example, entirely open to the persons in question to appeal to their intentions in justifying their actions in that form of activity. It is no longer optional for the persons to make recourse to their particular circumstances or their specific goals in explaining and justifying their actions. To belong to a practice is to disown appeal to one's own determinate circumstances at the outset except to the extent that it is allowed in the definition of the practice. Just the fact that a practice is indifferent to the multiple intentions or particular circumstances of those who belong to it allows us to characterize it in terms of its structure. But these are quite rough and general remarks about a practice, and we have to turn to the particular, though complex, practice of social association to examine its distinctive structure.

To understand the complex social activity that is governed by a system of rights, we might pose various kinds of questions. We might inquire, for example, into the general justifying aim or goal of rights. If we arrive at a substantive aim that all systems of rights are designed to secure, then the various rules of social association may be seen as guides to conduct promoting the general goal. Now, there are some ends such as happiness and the realization of human potential that seem comprehensive enough to accommodate the multiplicity of rules of conduct in social association.

But the comprehensive character of these ideals, which makes it initially natural to regard them as the justifying aims of social association, is deceptive. Happiness and human perfection are open to multiple, conflicting interpretations. But they would have to be given specific interpretations before they can be used to determine what men perform or forbear from in social association. If, however, these substantive goals are given specific interpretations, which is essential if they are to throw light on the nature of social association, it is unlikely that all rules of social association can be understood as directed to the advancement of a unique ideal. It would be absurd to regard all rules governing social association as directed toward happiness understood as pleasure, or self-realization understood as moral perfection.

It might be argued, however, that there are justifying aims of a system of rights which, unlike the goals of happiness and perfection, are not equivocal and, unlike the specific interpretations of these ideals, do not rule out many rights and legal rules out of hand. There is no perplexity in the contention that the object of all systems of rights is to impose order on human relations. The relatively formal aim of order cannot be dismissed as easily as the goal of happiness. It is possible for a social association not to aim at the happiness of its members; but it is impossible for any social association to be without any order whatever.

No particular social rule need be aimed at promoting happiness or human perfection; but order is built into the very conception of a rule. The existence of social association depends on the maintenance of order in the relations among its members. More specifically, in any social association, some rules must be observed, there must be a measure of regularity in expectations and their fulfillment, at least a few rights must be acknowledged and some obligations must be met. Thus, where social association exists, there must be rules and sanctions governing the actions of men. One might even go further to say that order requires that the rules of social association must not be mutually contradictory or frustrating. Order, as the justifying aim of social association, therefore captures certain elements that can be regarded as the minimal conditions of any social association.

But it is important to notice how much is left out of account if the sole aim of a system of rights is taken to be the provision for order in human relations. The requirements of order are compatible with all kinds of rules, including those that are manifestly unjust. Since the principle of order requires only that there be some rules and sanctions, it furnishes us with no criteria for the unique determination of the systems of rights. Indeed, the bare aim that there be some rules and sanctions cannot exclude

rules that would do away with the most basic rights and obligations that are recognized in actual legal systems.

A substantive definition of social association may be found that does not require reference to the general justifying aims of social association. The failings of the definitions in terms of aims may be avoided if we inquire into the content of rights and legal rules. The attempt to characterize social association in terms of its aims proves unsuccessful because it fails to specify the nature of the actual requirements placed upon us in legal systems. This shortcoming is not surprising, however, since it is an artificial if not a distorting picture that interprets legal rules as means for realizing some further goal. It would appear plausible, therefore, that we can determine the nature of a system of rights if we turn our attention away from the remote goals that rights and legal rules allegedly promote and focus on the content that they actually have. But this strategy for determining the nature of social association is also problematic. There is, in principle, no action that cannot form the content of legal rules or be the object of rights. But if the object of legal rules and rights is indeterminate, the attempt to determine a system of rights with reference to the content of legal rules and rights is idle.

If a system of rights cannot be defined in reference to either the substantive goals that men promote in belonging to such a practice or the specific nature of the actions

undertaken within the practice, it might be possible to explicate a system of rights in terms of the subjects to whom rights are ascribed and legal rules are addressed. If we turn from the object to the subject of rights, the indeterminacy surrounding the former is not to be found. In fact, there are very few kinds of entities to whom rights can be ascribed and legal rules can be addressed. It is only to persons that legal rules can be issued. Similarly, only persons are entitled to rights.

The fact that only persons are the bearers of rights can be illuminating in understanding a system of rights only if there is a way of specifying the concept of a person to show why it is the proper subject of this practice. There is a certain sense in which the specification of our concept of a person is a relatively straightforward matter. We use the concept of a person by contrast to animals, things and other beings that are not enfranchized. A person acts for reasons of his own. The concept of personality thus presupposes rationality. The capacity of persons to act for reasons of their own choosing means that we can ascribe responsibility to persons. This characterization of persons as responsible agents acting for their own ends enables us to distinguish persons from other sorts of entities. Natural things possessing no rationality would not count as persons. They cannot accept responsibility for their own acts. These basic features of the concept of personality indicate a

connection between the concept of person and a system of rights. Only responsible agents are entitled to rights, and it is only responsible agents that are designated persons. Of course, human beings that are not persons and even things may be the object of rights, but they cannot be the subjects to whom rights are ascribed. Although this connection between rights and the concept of a person is important, it does not reveal much about the structure of the practice that is governed by a system of rights. For this, the concept of a person needs to be further examined to determine why persons are the uniquely appropriate subjects of a system of rights.

If it were possible to establish the aim or content of rights, we could then proceed to find out those characteristics of personality relevant for the goal or content of rights such that rights are ascribable only to persons. But we saw earlier that the content of rights and the general justifying aim of a system of rights is indeterminate. Thus, the bearer of rights cannot be defined in terms of the content of rights or the general justifying aim of a system of rights.

There is, however, a way of deciding the question of the title to rights without reference to the substantive characteristics of either the content of rights or the justifying aim of a system of rights. The bearer of rights can be specified if the scope of a system of rights is established.

In the minimal characterization of persons as responsible agents, it was noted that only persons are entitled to rights because rights are ascribable only to responsible agents. The minimum characterization, therefore, establishes that rights are ascribed only to persons; it does not, however, establish the further claim that rights are ascribed to all persons. There is, however, a fundamental connection between the claim that only persons are the bearers of rights and the claim that all persons are the bearers of rights. And it is in the connection between the two claims that we can see that the concept of personality is constitutive of a system of rights.

If membership of a system of rights extends only to some persons, then there must be a specific characteristic that these persons possess through which they can be significantly distinguished from the other persons excluded from the realm of rights. But in the case in which only some persons are entitled to rights, the bearers of rights are not persons at all but human beings in virtue of possessing a determinate characteristic or relationship such as those of sex or blood relations. It is part of our basic characterization of persons that they have the capacity to act for their own ends. This is to say that, as distinguished from things, persons are not to be used just as means for securing the ends of others. Moreover, it means that persons are not to be defined by their natural characteristics or relation-

ships. For to say that persons have ends of their own is to say that they have value apart from the natural characteristics they possess, the statuses they hold, the particular relationships in which they stand. Therefore, to determine the bearers of rights in terms of their specific characteristics, however valuable, is to define men as beings with certain attributes essential for realizing some further end. But in this case, the bearers of right do not have value in their own right and are not persons at all. Thus, if only persons are entitled to rights, then all persons are entitled to rights; for if membership of a system of rights extends only to some persons, then those to whom rights are ascribed are not persons at all but human beings bearing certain definite characteristics deemed essential for realizing given ends.

The abstract characterization of the bearer of rights that is the outcome of establishing the essential connection between the claim that only persons are entitled to rights and the claim that all persons are entitled to rights furnishes us with a way of determining what the fundamental right of social association is a right to. The right of personality cannot be a right to something specific, whether it be a certain kind of action or a particular kind of thing. It may of course be the basis of rights to specific things, but it itself cannot be a right to something specific. For in the case in which the right of a person is identified with

a particular end, the idea of a person which essentially involves the self-determination of one's own end is abandoned. That is to say, the idea that a person has value in his own right is given up. The general right to stake one's claims is, of course, the condition for making specific claims. But to identify the two makes it appear plausible to think that men's rights are being recognized when the specific interests that they have are fulfilled. However successfully the task of fulfilling men's interest is accomplished, if this is all that is done, the essential right of persons consisting in the fact that they set their own ends is ignored. If the right of personality is taken to be a right to some specific end, what goes unrecognized is the autonomy of persons, or the principle that persons have value in their own right. The right of personality is, therefore, not a right to appear in a specific capacity, but a right to appear as such.

The abstract character of the right of personality is in congruence with the abstract character of the concept of personality which emerges as soon as it is clear that if only persons are entitled to rights then all persons are entitled to rights. Thus, although the particular ways in which men exercise their rights may differ, they are, with respect to the right of personality as such, equal. To say that persons are equal insofar as their rights are concerned is not to point to something with respect to which they may be compared.

Instead, it is to draw attention to the conceptual point that at the level at which rights are ascribed to men, there is nothing with respect to which they may enter into comparison.³ For the right of persons is not a right to undertake certain kinds of actions, to pursue specific ends, to advance particular claims; rather, it is the right to act, to set one's own ends, to be the source of claims. It is important, therefore, to insist on the formality of the right of personality, for by attaching content to the definition of the right of personality, what is being denied is nothing less than the person's fundamental right to appear.

But is there any right with which we are familiar that exemplifies the abstract concept of a person and the corresponding right to appear to which persons are entitled? What I wish to suggest is that it is the right to property that is the expression of the freedom of personality. But to see how private property is the appropriate embodiment of the right of personality, it is essential to consider what comprises private property. It is plain that anything that is external to a person including talents, capacities, ordinary things may become property. But to say that anything may become property is to say that no thing is included in private property in virtue of its specific qualitative and quantitative characteristics.⁴ In this respect, there is a

³George Wilhelm Friedrich Hegel, op. cit., Para. #49R.

⁴Ibid., Para. #45, #49.

basic identity between the concept of personality which is defined apart from the specific characteristics of the subject, and property which is defined apart from the specific characteristics of the objects possessed. The special congruity between the concept of personality and free private property can be seen further in the fact that all things that can be the object of legal rights ascribed to persons may also become property.⁵ And significantly, it is only personality itself that is excluded from the domain of free property.

One way of seeing the character of private property that makes it the exemplification of the right of personality is that the right to property does not rest either on the specific characteristics of the things possessed or the needs and wants that specific objects of property are intended to fulfill. But if the fundamental right to property does not depend on the nature of the things possessed or the nature of the needs and interests fulfilled through possession, what is it a right to? In holding property, whether this be in the form of talents and capacities or things, I appear before others as one with interests of my own, as an agent who sets his own ends, as a source of claims: that is to say, as proprietor, I appear as one who can pre-empt things for his own ends. This, of course, is my capacity as a person.

⁵Ibid., Para. #43R.

It should be noted, however, that to say that the right to property is just the right of persons to appear is not to point to some ineffable entity in which personality is embodied. It is indeed the case that only determinate things can be appropriated as property. This characteristic of property is already present in the right of personality which it exemplifies. Although the right of personality is the right to appear as such, it is not the case that we simply appear as persons. Instead, our formal right to appear manifests itself through particular appearances. There is no particular act which is the act of acting for ends of one's own choosing, or a particular claim which is the claim to be the source of claims. The formal capacity to act for ends of one's own adoption or to be the source of claims shows itself in specific ends adopted and particular claims advanced. But to identify the abstract right of personality and the right to property in which it is exemplified with their specific manifestations is to eliminate at the outset the freedom of personality that is peculiarly realized in social association.

The abstract character of the right of personality and free property in which it is exemplified determines in what the reality of the right is to consist. It was noted that the right of personality is the right to determine one's own end. In other words, the right is independent of the particular ends a person adopts or the kinds of actions he

undertakes. Similarly, the right to property, embodying the right of personality, consists in man's right to pre-empt things for his own ends. Here again, the right to property is independent of the particular needs and interests that the possession of specific things is designed to fulfill. Nor does the right depend on the specific qualitative and quantitative characteristics of the specific things possessed. In short, the right of personality and the right to property in which it is embodied consists in the capacity of persons to set their own ends; and the right is held quite independently of either the kinds of reasons for which the ends are adopted or the kinds of particular ends set. This formal character of the right of personality indicates what cannot constitute the reality of the right. The right cannot be established with reference to the particular ends men set. For in this case what is held to be real is the particular end which human beings are to advance; and, men enter into question only insofar as they possess specific characteristics relevant to the realization of the particular end. But in this situation, the right of personality consisting in the fact that persons themselves are to determine what they are to be or do is lost. Similarly, the right to property, understood as the entitlement of persons to pre-empt things for their own ends, cannot depend on the specific characteristics of the things, or the particular needs and desires they fulfill. Here the relation of persons to things would

be determined through the values of the things which men are to realize. That is to say, the right to property whereby things are to be used for ends chosen by men has been disowned. In both cases, if the right of persons is established by reference to the particular ends men adopt in exercise of their right, then what is renounced is the right of persons to determine their own ends. Thus the right of persons to decide what they are to be or do cannot be established as derivative from the specific actions they undertake or the particular ends they adopt.

The distinctive manner in which the right of personality is established may be brought out by considering the situation under which the questions of right can arise. The question of the right of personality cannot arise among men who belong to an association whose sole purpose is to secure a particular end. A community of monks or a utopian community designed to attain a unique end would be examples of such associations among men. Now, if this were the sole basis of the relationships among these men, then the duties and responsibilities of each member could be determined with reference to their particular end. In this situation, the right of persons to determine their own ends could not arise. Similarly, insofar as a solitary individual is concerned, no separate question arises as to his right to set his ends as distinguished from the question of the particular ends he in fact adopts. To see under what conditions the right of

personality appears, it is important to recall a peculiar characteristic of the concept of right noticed earlier. There is no particular end that is the end of choosing one's own ends, there is no specific act that is the act of acting for one's own reason, and there is no claim to be the source of claims. A person exercising his choice as to what to be or do in fact chooses particular ends, advances specific claims. Thus, the right of personality, understood as the right to determine one's own ends, as distinguished from any given ends, comes up only in that relationship among persons in which the variety of particular ends to be adopted is, in principle, unlimited. In other words, my right to set my own ends, as distinguished from the particular ends I choose, manifests itself only under the conditions in which I choose my ends in relation with others who also set their own ends.⁶

The claim that the right of personality can arise only in a relationship between persons must be correctly understood. The claim does not depend on any psychological theory of human nature. For example, it does not rest on the egoistic psychology that informs much of liberal social and political thought: namely, the contention that men are solely or predominantly self-interested, and that it is the conflicts that follow upon this that give rise to questions of right. The claim concerning the background against which the right of personality can arise does not depend on this

⁶Ibid., Para. #71.

or any other psychological theory. This can be seen readily in the fact that the question of a person's right to set his own ends arises as soon as persons so entitled interact, whether they be self-interested or mutually interested. Similarly, the account of the conditions under which the right of persons may arise is independent of any particular economic theory. For example, it does not rely on the assumption of scarcity in human goods which is frequently supposed to be the source of conflicts between persons who otherwise have harmonious interests. In the situation in which persons enter into relations in which there is, in principle, no limit to the particular ends adopted, the question of rights arises whether there is a shortage or abundance of human goods necessary for realizing these ends. Thus, the characterization of the conditions under which the right of personality is manifested does not rely either on a general psychological or economic theory. Instead, what is here taken for granted is that men enter into relations. That is to say, no motivations are assigned to men for entering into relationships. Further, no general theory of human nature or human goods is appealed to in explaining why these relationships may be characterized by general harmony or conflict. Rather, the point is that the relationship among persons pursuing ends on which no limits have been placed is the situation in which the right of persons to set

their own ends can become at issue. And this is a conceptual point about the setting in which the questions of the rights of persons appear.

But the relationship which sets the stage for the establishment of the right of personality must be of a special sort. There are certain relationships in which men are not engaged as persons, and accordingly in which the right of personality is not established. For example, men can engage with animals or things in a joint activity directed at a certain goal. In this situation, the various parties to the relationship serve as forces whose simultaneous exercise yields a particular end. In other words, the relationship does not involve mutuality. Non-mutual relationships among human beings are also possible. Human beings may enter into a relationship in which the only basis for membership is that the various parties possess certain talents and capacities whose joint exercise yields a certain outcome. If this were the sole basis of the relationship, then human beings are engaged in it as bearers of certain qualities which are essential to the ends of the enterprise. The status of slavery involves just such a treatment of human beings as merely bearers of definite capacities. This treatment of human beings without regard to their personality does not, of course, have to do with the brutality which men may suffer in these relationships. If men are party to a relationship of merit in which they are granted privileged

treatment solely for possessing qualities that are deemed desirable, they would not be treated as persons. That a human being in such relationships is not a person with ends of his own can be seen in the fact that the bearer of the relevant specific qualities can be replaced by another with the same qualities without impairing the relationship. In this capacity, human beings are on a par with things which are valued only insofar as they have attributes essential to the attainment of specific ends. What these relationships lack and what the relationships of right require is the mutual recognition of men as independent agents who set their own ends, and who are not, therefore, merely so many forces critical to the realization of particular ends. Thus the right of persons to set their own ends, as distinguished from the particular ends they pursue, is established in a mutual relationship whereby each person is recognized as a person by all persons.⁷

The distinctive manner in which the right of personality is established is important in understanding the character of the fundamental right. The right of personality is not a right to a particular end to be established with references to the nature of the end and the kinds of qualities essential to its realization. Rather, it is a right to set one's own ends which is established in and through the mutual recognition of persons capable of determining their own ends.

⁷Ibid., Para. #71-#75.

In other words, the fundamental right of persons is a practice within which a variety of in principle unlimited ends can be pursued by mutually independent agents. Accordingly, the right of personality is not an individual's right to a sphere of immunity from interference in the exercise of his freedom to choice. For, as we saw earlier, in the situation in which we are presented with the isolated individual, no question can arise concerning his capacity to set his own ends apart from the particular ends he adopts. Thus, the freedom of personality is the structure in which persons are recognized as mutually independent agents free to pursue any ends.

Not only is the right of personality not a right to a particular end, but it is also not a right to rights. That is to say, after we have drawn a list of all the determinate rights in a legal system, there is not yet another right which is a right to the rights included in the list. This conception of the fundamental right of personality gives rise to the misleading picture that claims to particular rights are justified by reference to the basic right of persons. But this makes it appear plausible that the fundamental right is, in turn, to be justified, and that the hierarchy of justification is to go on. The unfortunate consequences of this view are not forthcoming if the right of personality is understood as the structure of a community of persons. In this light, the right of personality is not

a right to rights, which is another, albeit more basic and inclusive, right. Instead, the right of personality is the structure of relations within which particular rights can be ascribed. That is to say, once individuals mutually recognize each other as independent agents who are to decide their interests, what is established is not a right in terms of which other rights are justified, but a practice within which particular rights can be determined.

The fact that the right of personality is not a specific, albeit basic, right prescribing particular rights, but a formal structure of relations setting the stage for ascription of particular rights does not mean that the right of personality is not normative. To see that it is normative, it is essential to understand the distinctive formality of the right of personality and the practice in which it is established.

The peculiar formality of the right of personality constituted through the mutual recognition of persons as mutually independent agents can be brought out by contrasting it to another formal principle: the principle of impartiality. The difference between the recognition of men as free agents and the principle of impartiality among men can be seen initially in the fact that there is nothing in the principle of impartiality that forbids the equal treatment of human beings as things with certain qualities. What the practice of rights establishes and what the principle of

impartiality can rule out is the recognition of men as independent agents who set their own ends. This possible difference is a consequence of a more basic disparity that can be understood by drawing attention to the distinctive ways in which the right of personality and the principle of impartiality are formal. The principle of impartiality is formal in that, as it stands, it does not tell us the specific ways in which men are to be treated alike. Although the principle of impartiality does not specify the manner in which men are to be treated similarly, if the principle is to be significant at all, it is essential that a specific content be attached to it specifying the way in which men are to be treated alike. The right of personality, on the other hand, is formal in the sense that qua persons, there is logically no way in which men may not be impartially treated. That is to say, at the level on which men enter the practice of rights, there is logically no way in which men can enter into comparison and hence be differently treated. The practice of rights is formal, therefore, in that within it all the respects in which men can be differentiated are ruled out of consideration. Thus, it is just the distinctive formality of the right of personality and the practice in which it is established that constitutes the normative character of the right and the practice in which it is realized.

The normative force of a practice of rights can be seen in another way. Unless the right of personality is

established as the structure of a community of persons, there cannot be anything that can be described as a particular right of an individual. Individuals may have duties to a lord or king in virtue of their respective positions in a hierarchial order whose end defines the specific obligations of members of the hierarchy. Similarly, human beings may be entitled to certain privileges in virtue of possessing a certain status or in belonging to an estate. But in these situations, there is nothing that can be described as the particular rights of persons, because there is nothing that can be described as a right or a person in the first place. It is only upon mutual recognition of persons thereby establishing the practice constituted through the right of personality that any claims of individuals can be described as a claim of right. Social association or the practice constituted through the recognition of freedom of personality is logically prior to any particular rights that individuals may possess.

There is a possible objection to the claim that social association or the practice formed through the recognition of the right of personality is the condition for particular rights. It is an often repeated contention that rights are universal, belonging to human beings as men. Thus it may be argued that the entitlement of all men to rights is ruled out of hand if the condition for particular rights is seen to be a community of mutually recognizing persons,

since it is plain that not all men belong to such an association. But this objection is based on a misunderstanding of the universality of rights. The claim concerning the universality of rights cannot mean that all men in fact have rights since this is plainly false. It might mean that all men are potentially entitled to rights although not in all cases do they and others recognize that they do. This, however, will not do since it begs the question at issue, which concerns just the conditions under which men possess rights. What then is it that is being said philosophically when we speak of the universality of rights? It was earlier noted that it is persons who are entitled to rights. But if persons are the only proper title holders of rights, then to possess rights one need only be ^a person since, qua persons, no distinctions can be drawn among human beings. Thus when we say that all men have rights, we are saying that all men can be regarded as persons. But it is idle to deny the possibility of a form of human association in which human beings are regarded solely in terms of their merits or their status or their blood relations. To say that all men can be regarded as persons, in respect to which there cannot be differences between them, is not, therefore, to deny that there can be practices in which their personality is left entirely out of consideration. Thus, the universality of rights is not a claim about whether all human beings do, in

fact, have specific rights, but is best understood as a way of stating that the practice of rights is, in principle, universal.

A similar confusion between the practice of rights and what is possible within the practice can be seen in the frequently advanced contention that it is not a condition of a man having a right that it be recognized. It is argued, for example, that children are entitled to specific rights although they may not recognize that they are. This is only partly true since children's entitlement to rights is only possible within a practice in which the right of personality is established, since, as we saw earlier, the practice is the condition for the possession of determinate rights by anyone. The practice, in turn, is constituted through the mutual recognition of persons. The mutual recognition of persons is not, however, the recognition of any specific right but the setting up of the institution of right. Once the institution of right is set up, persons may be entitled to specific rights, but it is not a condition of the specific entitlements of men engaged within the institution that these be recognized.

It has been argued that the mutual recognition of persons is not a prescription for a particular end or the recognition of a specific right; it is rather just the setting up of the institution of right within which any ends may be pursued and specific rights may be acquired. But the

mutual recognition of persons establishing the practice of rights sets normative limits to determinate rights possible within the practice. The practice of rights is constituted in and through the recognition that individuals are entitled to decide what they are to be or do. Accordingly, within the practice, men cannot be forced to serve the ends of others and thereby denied their capacity to set their own ends. The demand that others serve our ends, however edifying the ends may be, cannot be justified under the practice because the demand is tantamount to a rejection of the practice itself. Particular general rights are various exemplifications of the person's entitlement to non-interference in his capacity to set his own ends within the practice of rights. Further, a person in his capacity to decide what he is to be or do under the practice may entitle others to set specific ends on his behalf. Special relationships such as promises, contracts, authorizations, possible within a community of persons, give rise to particular special rights to justified interferences in the freedom of other persons. These interferences under special rights are justified because, under the practice, all persons are free to set their own ends; and this includes the freedom to entitle others to set particular ends and realize them on their behalf. The practice not only makes the particular claims of special rights possible; it also sets limits as to what these special rights may be. A person may entitle others

to decide and act on his behalf with respect to determinate ends. But a person cannot entitle another to determine all his ends without renouncing his right of personality and thereby excluding himself from the practice of rights. Similarly, in exercise of the right to property, exemplifying the right of personality, a person may alienate his talents and capacities. That is to say, in exercise of his right to pre-empt things for his own ends, a person may entitle others to use his talents and capacities for particular ends. But he cannot alienate all of his talents and capacities under the practice. For if a person entitles others to determine the whole range of his ends and to pre-empt the entirety of his capacities and talents, the practice constituted through the mutual recognition of persons as agents free to determine their own ends would have lost its point altogether.⁸

Within the structure of freedom, the claim to renounce freedom is not a possible claim. Subject to this important limitation, imposed by the practice, persons can enter into a variety of special relationships giving rise to special rights granting others a justified interference in their freedom. But to indicate the limitations imposed on special rights by the practice is not to suggest that all the particular special rights possible within the practice can be foreseen. Except in a very general way, the specific rights possible within social association cannot be deter-

⁸Ibid., Para. #67.

mined in advance. Indeed, even general rights requiring non-interference in a person's right to set his own ends within social association can vary depending on the multiple and changing ways in which interferences may be made on the freedom of persons. To point to the normative limits set on the two classes of determinate rights by the practice of rights is not, therefore, to determine in advance what these determinate rights are to be; instead, it is to suggest that the mutual recognition of persons setting up the practice of rights yields a coherent structure of rights.

The fact that the practice of rights gives rise to a coherent structure of rights does not mean merely that the determinate terms of the practice can be spelled out. That the practice can yield determinate rights further points to an important feature of the form of the practice. The manner in which the right of personality may be violated is unclear. It is not possible to state in advance the various kinds of acts which would constitute violations of the right of personality and the practice in which it is realized. Similarly, it is not possible to state in advance the particular ways in which justified interferences can be made upon the rights of other persons within the practice. To say that these particular acts permitted or ruled out within the practice cannot be set out in advance is to say that the practice, prior to the specification of general and specific rights, cannot be the object of legal rules. But once we

have the particular general and specific rights possible under the practice, then these determinate rights can be the object of legal rules. Thus, to say that the practice of rights yields a coherent body of general and specific rights is not to suggest that we can draw conclusions regarding the content of particular rights within the practice. Instead, the fact that the practice of rights can give rise to a structure of determinate rights means that the practice can assume the form of positive law.

The determinate character of these specific rights making it possible to set them in the form of positive law introduces new features into the practice.⁹ Once the particular rights have been laid down as law, there will be a common body of authorized rules that can be appealed to in determining whether there is a violation of right. There would be little uncertainty as to whether a particular action would be a violation of right, since the legal rules state what constitutes a violation. Further, when there is an actual violation, this would not be merely an infringement against personality. Instead, it would be a violation of publicly known and acknowledged rules. Moreover, once there are legal rules, there can be an authority determining whether particular cases fall under them, and deciding on the requisite punishment in the cases of violations of right. The

⁹On the practice of rights in its form as positive law see, Ibid., Para. #3, #211-#215, #217A, #219.

presence of a common authority is important not only to introduce certainty and precision in the determination and application of the determinate terms of the practice.

Further, once there is a common authority to be appealed to in particular cases of dispute arising within the practice, we are not reduced to dependence on the various parties to the practice for deciding whether there has been a violation of the terms of the practice and for undertaking acts of revenge against infringements upon their personality. With a common authority, offenses against the right of personality can be treated as violations of law and hence as offenses committed against the practice of right itself.

It is important to notice the status of the determinate form of the practice. The practice is the condition for the possibility of determinate general and specific rights. Furthermore, the practice sets limits as to what the classes of determinate rights are to be. But once we have these particular rights giving determinate expression to the terms of the practice, we can see how the practice can have the form of a positive legal system. In short, the determinate form to which the practice gives rise allows for common rules and a common authority which can be appealed to in justification of particular actions within the practice and the sanction of violations of the terms of the practice. This is not to suggest, however, that the nature of justification within the practice changes when it acquires a

determinate form. Since the determinate rights exemplifying the terms of the practice are in turn justified by appeal to the practice, even where the practice has the positive form of common rules and a common authority, ultimate justification rests on the right of persons which is established within the practice. What the practice allows in its determinate form are ways in which the terms of the practice can be recognized, justified and enforced independently of the decisions and actions of the particular individuals who are party to the practice. Thus, the practice of rights is not only the condition for particular rights and the normative limit to what these rights can be; the practice also sets the conditions under which its constitutive principles can be recognized, justified and enforced independently of the contingent decisions and actions of the particular individuals who are party to the practice.

III. The Practice of Social Association: The Material Structure

The discussion so far has focused on the abstract characteristics of the practice of social association. The practice has been explicated in terms of the formal relationships among the concepts of personality, private property and mutual recognition. The account has been formal in the sense that social association between men has been considered in abstraction from the substantive ends that men pursue in belonging to social association or the kinds of actions they

undertake to reach these specific ends. This formal treatment of social association has not been arbitrary. As we saw, the practice of rights cannot be established with reference to the substantive ends that men adopt or the specific characteristics they possess relevant for reaching these ends. And if men enter the practice of rights only in their capacity as persons free to set their own ends, then, within the practice, the specific ends that men posit and the particular attributes they possess for reaching these ends are a matter of indifference. Thus, the formality of the account has been dictated by the fact that within the practice itself, the substantive ends that men hold are left out of consideration.

If the practice of social association is constituted in abstraction from the substantive ends that men set, what is meant by the material structure of the practice? The material structure of social association comes into light if we pose the following question: "Is there an ordinary activity with substantive ends in which men engage in virtue of belonging to a system of rights?" To clarify this formulation of the question regarding the material determination of social association, it might be best to contrast it to the formal determination of the practice discussed earlier. It was noted above that the practice of rights gives rise to general and specific rights which are determinate entitlements that persons have within a system of rights. These

general and specific rights can be the object of positive laws and a public authority. The presence of publicly recognized rules allows us to determine in advance whether a particular action is one to which we are entitled. Violations of the terms of the practice will no longer be merely infringements upon personality, but also infractions of publicly known and recognized rules. Further, in case of infringements upon the terms of the practice, we are not reduced to revenge as the only course of correction, but can appeal to a common office with authority to determine offenses and hand out punishment. Thus, although ultimate justification of these determinate rights depends on the practice itself, in its determinate form as positive law, the practice acquires validity apart from the particular individuals who are party to the practice.

It is important to recognize the formal character of the determination of the practice. The determinate general and specific rights that are the object of legal rules are not established with reference to specific ends that men have. Instead, specific and general rights are determinate expressions of the capacity of men to set their own ends within the practice of rights. However, in their determinate form as expressed in general and specific rights, the principles of the practice of rights can be set down as a body of common rules that are backed by a common authority. The determination of the practice of rights consists, therefore,

in the formal requirement that the principles of the practice of rights be laid down as positive law.

The material determination of the practice, on the other hand, consists in a specific activity with substantive ends in which men engage as members of a system of rights. The difference between the two kinds of determinations may be seen in the fact that a system of rights formally determined in the sense of being embodied in positive laws supported by a public authority is not thereby materially determined in the sense that men are engaged in ordinary activities governed by a common body of rules and a common authority. To say that a system of rights is formally determined means that the principles of the practice are enforced through publicly recognized rules and authorities. To say that the system of rights is materially determined means that the principles of the practice are interwoven into the ordinary activities of men.¹⁰ Thus, an account of the material structure of social association would show how the system of rights and its determinate form as positive law can come to have a footing in the lives of men.

In what follows, I propose to show that the practice of social association exists as a system of rights governing the ordinary activities of men. I shall attempt to demonstrate that there is a specific activity with substantive

¹⁰For Hegel's account of the material determination of the practice of rights, see the discussion in "Civil Society": Ibid., Para. #182, #183, #186, #187, #213, #217.

ends that is governed by the principles of right.¹¹ In particular, I wish to argue that the provision for needs and wants in a form of production for free exchange is governed

¹¹There is a class of relationships which presupposes the mutual recognition of men as persons. Aside from considerations of space, these relationships are not examined in the essay because what is distinctive about them is not that they involve relationships of right but that they go beyond them. The manner in which personal relationships involve the mutual recognition of men as persons is clear. It is a condition of a relationship of mutuality between men that they recognize each other as agents free to choose their own ends. (Cf. Ibid., Para. #167.) Friendship, marital and parental relationships are, therefore, personal in the sense that they are only possible between persons. There is, however, a second sense in which such relationships are personal. Indeed, it is the distinctive feature of personal relationships that those party to them do not merely acknowledge each other as agents with ends of their own, but also mutually hold the ends of the other persons in the relation as their own. The characteristic virtues in these relationships, love, care, devotion, fidelity indicate the manner in which regard for the ends of other persons is the prominent feature of personal relationships. Further, the identification with the ends of others in these relationships means that, unlike relationships of right, it is important that there be harmony in the ends adopted by those party to the relationship as well as harmony in their dispositions. All these distinctive characteristics of personal relationships are highly subjective. As such, what is significant in personal relationships does not have general determinate characteristics that can be embodied in rules. Further, the subjective features go beyond what would be regarded as the sphere of legal obligation. Even in the most determinate of such relationships, the institution of marriage, relationships of right figure importantly only insofar as those aspects of the marriage relationship that go beyond relations of right break down in such cases as divorce and inheritance. A close examination of interpersonal relationships would show how the variety of such practices intersect at different points with the practice of rights. More importantly, it would focus on what is distinctive about reciprocal relationships: the manner in which they go beyond the practice of rights discussed in this essay.

by a standard of value which, in turn, presupposes a system of rights.¹² And it is only when the principles of the system of rights are interwoven into the ordinary activity of providing for needs and wants that the formal system of rights can exist as the concrete practice of social association.

That men have a variety of needs and wants is here taken for granted. What these needs are and the extent to which they are historically determined is unimportant for our purposes. Nor is it necessary to make any assumptions as to whether these needs are good or bad, real or contrived. The fact that human beings do have needs and wants and that they make provisions for their satisfaction is significant because

¹²On the concept of "value," in addition to the references to Karl Marx's account in footnote 2, see also: George Wilhelm Friedrich Hegel, op. cit., Para. #63, #77, #88, #98R, #101, #204, #298. Max Weber, On Law in Economy and Society, op. cit., pp. 289-300. Aside from the writings of the classical economists on what is termed "the labor theory of value," there is an extensive literature on Marx's critical appraisal of the classical theory of value. Almost all of this literature is on the economic rather than the philosophic import of Marx's account of value. The most important contributions of this kind are summarized in: R.L. Meek, Studies in the Labour Theory of Value (London: Lawrence and Wishart, 1956). For discussions of Marx's concept of value from philosophical points of view quite different from the one suggested in this essay, see H.W.B. Joseph, The Labour Theory of Value in Karl Marx (Oxford: Oxford University Press, 1925). William Ash, Marxism and Moral Concepts (New York: Monthly Review Press, 1964). An illuminating discussion of the importance of the concept of value for social theory can be found in: Maurice Doob, Political Economy and Capitalism (New York: International Publishers, 1945), especially Ch. I.

it is an activity that is undertaken not in a special capacity as persons entitled to rights or as moral subjects or as citizens of a political community but simply as men.¹³

Although needs and the search for objects to satisfy them is an ordinary feature of human activity, the provision for needs and wants is made under varied forms of production. The system of rights figures in the provision for needs only in the case in which the satisfaction of needs is carried out under a particular mode of production: a form of production for free exchange. The form of production for free exchange can be outlined as follows. Under this mode of production, the means of production are freely appropriated by individuals. And since the right to free appropriation includes the right to alienation, under this mode of production individuals can freely exchange the means of production on the market. Thus, a society in which use of the means of production is determined by membership of a community or a certain class of the community would not be a mode of production based on free exchange. Further, under the mode of production for free exchange, a person's labor, understood broadly as the exercise of talents and capacities, is appropriated by the individual. And, in the case in which the individual is proprietor of his capacity for labor, or his labor-power, he can exchange his labor-power for other

¹³George Wilhelm Friedrich Hegel, op. cit., Para. #190R.

products in the market.¹⁴ This mode of production is to be distinguished from one in which labor-power is appropriated by the community or a class within the community and cannot, therefore, be freely alienated in exchange. It should be noted that this rough outline of the features of a mode of production for free exchange under which the means of production and labor-power are freely appropriated by individuals is not meant to exclude intermediate historical cases in which certain means of production and labor-power may be excluded from exchange. Thus, the mode of production for free exchange may be understood as one in which labor-power and the means of production are, in principle, appropriated by individuals and are, therefore, freely exchanged in the market.

There is an important difference separating societies in which the provision for needs is carried out under a mode of production in which labor-power and the means of production are freely appropriated by individuals and those in which systematic restrictions are placed on individual appropriation. Under modes of production in which labor-

¹⁴The distinction between "labor-power" and "labor" which Marx considered "the pivot on which a clear comprehension of political economy turns" should be noted. (*Capital*, Vol. I, *op. cit.*, p. 41.) "Labor-power" or the capacity for labor is exchanged in the market and is assigned value in the same manner as the means of production and the products of labor. "Labor," however, is not itself exchanged, but consists in the use of the capacity which is exchanged in the market. The use or consumption of labor is a significant element in the process of producing goods.

power and the means of production are not freely appropriated by individuals, labor and the conditions of labor belong to a certain status or function as determined by a given order. Under this mode of production, both labor and the conditions of labor are means for realizing certain set ends. Thus, the change from this mode of production to one in which labor-power and the conditions of labor are freely alienable by the individual is not just one of an increase in the scope of objects that can be appropriated. Instead, what is involved is the radical change whereby the individual and the conditions for production are no longer means for realizing certain set ends. Indeed, in the mode of production for free exchange, labor-power and the conditions of labor are freely used by the individual to realize his own ends. But if the mode of production based on free exchange is one in which there is no pre-established assignment of values, how is the value of labor-power, the means of production and other objects used for the fulfillment of needs to be determined?

In a mode of production in which labor-power, the conditions of labor and all products of labor are appropriated by individuals, the value of an object is determined through exchange. Most generally, exchange value is the proportion in which quantities of certain objects of use can be exchanged for given quantities of other objects of use. From this quite general characterization of the relation of

exchange, we can see that exchange value is a relationship that obtains between different objects capable of satisfying different wants. Further, exchange value is susceptible of being expressed in quantitative terms. But these are very general characteristics of value in exchange, and we must take a closer look at the relationship of exchange to arrive at a better understanding of the phenomenon of value.

If we take an object of use in a relationship of exchange, it can be exchanged with given quantities of a variety of other useful objects. Now, each of these objects expressing the exchange value of the original object stand in relationships of equality with one another. But if all these objects of use expressing the exchange value of the same object are themselves of equal value, what is the standard in terms of which they can be said to have equal value? The problem itself suggests certain requirements that would have to be met by such a standard. First, since the relationship of equality obtaining between the various objects of value is quantitative, the standard with respect to which they are equal must be something that can be expressed quantitatively. The second requirement, which is closely related to the first, is that the standard cannot itself be an object of utility or a useful characteristic of an object since the qualitative attributes of objects in virtue of which they satisfy human needs, and indeed the satisfactions gained through their consumption are not

commensurable and hence cannot be said to be something common to them all. If the useful characteristics of objects are not commensurable, they cannot, of course, be expressed quantitatively. Third, the common standard with respect to which the exchange values are equal cannot itself be a value. It is, of course, possible that the value of a limited set of objects can be expressed relative to some other value. But if objects of value are considered as an aggregate, the attempt to employ something that is a value as a standard of their value would involve a regress. To ultimately answer the problem of why anything has value in exchange at all, it is necessary that appeal be made to something generically related to objects of value but itself not a value.

If we consider labor-power, the conditions of labor and the products of labor, all of which enter into exchange, is there something that stands in the same relationship to all of them and meets the requirements of the standard of value set forth above? At first sight, it is clear that all these objects in exchange, taken as an aggregate, have certain significant features in common. All of them are, in some measure, products of nature. But the qualitative features of nature that enter into the production of different objects are not commensurable. Thus, the fact that they are products of nature is not something common to all objects in the required sense. Accordingly, the fact that all objects are, in some measure, products of nature is not a

feature of objects that can be determined quantitatively. Further, all these objects in free exchange have utility. But, as noted earlier, the fact that these objects are valuable in fulfilling needs and wants is not something common to them in the required sense. The uses to which objects may be put are quite varied and are not reducible to some single common use. Moreover, it is quite possible that an object may be useful just because it has value in the required sense, thereby rendering the employment of utility as a standard of value problematic. Once these natural characteristics common to objects in free exchange are eliminated for failure to meet the requirements of a standard value, there is one characteristic left which all these objects have in common that emerges if we turn to the subject of exchange, the characteristic of being products of labor. But the fact that all objects in exchange are products of labor is a very broad feature of these objects. In order to see how this feature of objects serves as a standard of their value, we have to isolate that form of labor that can be said to be common to all objects in free exchange.

The labor that enters into the production of objects of use has a number of specific characteristics. An object of use is designed for the fulfillment of a particular need. The end which the characteristics of the objects are capable of realizing dictates the kind of labor to be employed in the production of the object. To realize the specific end, the

labor in question has to be endowed with skills of a particular sort. Similarly, the labor engaged in the production of specific objects of use has to make use of instruments of a definite kind. Thus, insofar as each object of utility is designed to meet a specific need qualitatively different from those of other objects in use, and insofar as the characteristics in virtue of which it fulfills these needs are qualitatively different from those of other objects, the kinds of labor expended in the production of these objects are as qualitatively different as the objects themselves. Thus, the specific forms of labor which enter into the production of objects of utility cannot be regarded as something common to all objects that enter exchange. And since value in exchange is something that all these objects have in common, the objects cannot be said to have value owing to the specific forms of labor used in their production. Accordingly, we need to establish whether there is an aspect of the productive activity of men which is without incommensurable specific characteristics.

If the attribute of being labor expended for specific ends, the characteristics of being labor possessing definite skills and employing particular kinds of instruments are all abstracted from labor used in the production of objects in exchange, there is one feature of labor outstanding from these abstractions: namely, labor is an activity of men. In other words, all objects in exchange considered as an

aggregate are products of a certain expenditure of human labor. Labor-power, the means of production and other objects of use all have value in exchange because they are products of labor expended during a certain time. Thus, the value of all objects alienated in the market, including that of labor-power, can be determined in terms of the labor time expended for their production under the average level of skill and technology prevailing in that sector of production. Therefore, given quantities of qualitatively different objects have the same value owing to the fact that the same amount of labor time has been spent in their production. In short, labor in abstraction from the variety of its qualitative characteristics and considered under the aspect of human labor time alone is a feature common to all objects of value, although it itself is not a value in exchange. Human labor time therefore satisfies all the requirements of a standard of value in exchange.

How is value in exchange and its standard abstract labor time to be established in practice? The problematic of establishing value and the standard of value in social practice is already present in the distinction between the value in use of an object and its value in exchange and the correlative distinction between concrete labor endowed with specific attributes and labor in the abstract understood simply as human labor time. More specifically, the question of establishing value and abstract labor time as its standard

in practice may be brought out by considering the manner in which the value in exchange as opposed to the use of an object and similarly how abstract labor as opposed to concrete labor shows itself. The characteristics of an object whereby it has value in fulfilling a certain need can be established simply through its use. But the question of the value of an object as distinguished from its use cannot arise in the case of an isolated object. When we have considered all the characteristics of an object in virtue of which it fulfills human needs and wants, there is not yet another quality outstanding which constitutes its value. There is no particular object which is just an object of value, in the way in which there are particular objects whose end is the satisfaction of specific needs. Similarly, all cases of the exercise of labor involve the expenditure of a certain kind of human energy to produce objects capable of meeting quite specific needs. But, apart from the specific forms of labor endowed with particular skills and employing certain sorts of instruments, there is not still another kind of labor with special skills and peculiar instruments that is just the expenditure of homogeneous or abstract labor directed at the creation of value in exchange. Thus, the setting in which exchange value and its standard, human labor time, appear must be of a special sort.

Exchange value shows itself in the practice in which two useful objects are brought into a relation of exchange.

Under this relationship, an object with a certain use expresses its value in exchange in terms of a certain quantity of another object. Several features of this relationship in which exchange value appears should be noted. The fact that a certain object of use has value appears when it is exchanged for another object with a different use. In other words, no object of use can give expression to its own value in exchange; and, the value of an object is expressed in the use value of another object. Similarly, it is only in the relationship of exchange between qualitatively different objects that the qualitatively different kinds of labor that enter into the production of goods are left out of consideration, leaving the fact that it is human labor as the only aspect of labor taken into account in the social practice of the exchange of objects. In other words, no specific object can give expression to the fact that it is the product of human labor; and, the human character of the labor employed in its production finds expression in another object produced by a specific form of labor different in kind from its own. Thus, the value of an object and its source in human labor finds expression independent of its use and concrete labor only in the setting in which different objects are placed in a relationship of exchange. The medium employed for expressing the value of the object and its character of being the product of human labor under the relationship is another object with specific attributes and concrete labor

with particular characteristics. But to say that objects with specific characteristics and embodying different kinds of labor serve as the expressions of the quite different characteristics of being values or the products of human labor is to say that the practice in which value and abstract labor appear is one in which the specific attributes of objects and the definite qualities of labor are left out of account.

The relationships of exchange in which the specific characteristics of the objects and the labor employed in their production are left out of account so that they serve merely as the objective expressions of value and the human status of the labor in virtue of which it is value must be relationships of a certain level of generality. The fact that an object of use is set in a relationship of exchange with an object with different utility must not be simply an exception to a different mode of production which is the rule. In this case, the exchange between the two objects would not have the characteristics of the relationship considered above in which value and abstract labor time appear in practice. For example, in barter, in which the exchange relationship between two objects is exceptional, the two objects are primarily treated as objects of use and, therefore, in virtue of the specific characteristics they possess, the particular kind of labor used in their production and the definite needs they are to fulfill. Accordingly, the

specific characteristics of the object and the labor used in its production do not serve as objective expressions of value and the human character of labor. The fact that the relationship between an object and another for which it is exchanged is not accidental or exceptional can be seen in social practice. If the specific attributes of an object and the labor used in its production serve merely as the expressions of the value of the object for which it is serving as exchange, then the former can be replaced, in principle, by the qualities of any object whatever. Each of the objects that stands in a relation of exchange to the original appears in abstraction from the specific characteristics rendering it useful and the special form of labor used in its production. But if the relationship of exchange consists in the fact that all objects in turn stand in exchange with the same original object and thereby appear in abstraction from their own characteristics, the practice would not have the requisite generality whereby the totality of objects appear in abstraction from their specific characteristics to express merely that they are value. For if all there is to the practice of exchanging goods is that each object serves as exchange for a single object, then in the relationship among the objects in exchange, the specific characteristics whereby they have utility and the particular forms of labor expended in their production would still figure importantly. The practice of exchange in which the totality of objects would

appear in abstraction from these specific attributes is one in which all are exchangeable against a single object. This would be the converse of the situation in which a single object can stand in relation to all other objects each of which in given quantities serves as its exchange. When the isolated object is socially recognized as the equivalent for the totality of objects in exchange, it serves as money. In this generalized form of exchange, each and every object is directly exchangeable with the single object which serves as the socially recognized equivalent of value. Accordingly, each and every object can be equated with every other as value. That is to say, the totality of objects appear in abstraction from the specific characteristics of use and the particular forms of labor used in their production and stand to each other simply as values or as objective embodiments of a certain expenditure of human labor time. Indeed, it is only when objects of use appear under their single common aspect as value that the wide variety of objects used for human needs and wants can be properly regarded as constituting a totality. In short, the exchange of objects in which the totality of objects are set in exchange with one object which is socially recognized as their equivalent is the social practice in which their single common feature as value finds full objective expression.

The significance of treating the totality of objects as values in the practice of exchange can be seen if we

recall the standard in terms of which they are values. It was noted that within the practice in which all objects of use are in free exchange, all objects of utility are treated as values. Accordingly, within the practice of exchange, all objects are regarded as equal. But to say that all objects are equally values insofar as they enter the practice of exchange is not to isolate a mysterious quality which they all share. Instead, it is to make the conceptual point that under the terms of the practice of free exchange, all the other respects in which objects of use can be unequal are left out of consideration. And the respect in which objects of use can only be treated alike is that they are all products of labor. But it is important to stress what it is about labor that can be regarded as a common feature of all objects in exchange. Labor is equally a common feature in all objects owing to its human status. Aside from its specific characteristics and the definite ends for which it is exercised, labor has value in its own right as the activity of men free to set their own ends. And when labor is regarded simply as the productive activity of individuals free to set their own ends, there is no way in which labor can be treated differentially. Thus, to consider labor under its aspect as human is to give tacit acknowledgment to labor in its social character as the activity of men who mutually recognize each other as agents free to determine their own

ends. Thus, to ascribe value to all objects in free exchange presupposes the mutual recognition of men as persons.

The relation of the material structure of social association to the formal structure of social association can now be stated. The provision for human needs and wants is an ordinary activity with substantive ends in which men engage. The conduct of the provision for needs under a mode of production for free exchange requires the treatment of objects of use as values. Objects of utility can be regarded as values, however, only when they are considered simply as the products of the activity of free persons. Thus, in a mode of production for free exchange, the provision for needs and wants, which is an activity undertaken in our ordinary capacity as men, involves in practice the use of a standard of value which presupposes our membership of a community of persons. There is, therefore, a significant ordinary human activity with substantive goals that is governed by the formal system of rights.

IV. Concluding Note: On the Significance of the Relation of the Formal to the Material Structure of the Practice of Social Association

In the account so far the attempt has been to show that there is an important activity in which men take part that is governed by the system of rights. But it is as yet unclear how the fact that there is a practice governed by the formal system of rights enters into the concept of social

association. That is to say, the attempt in the foregoing sections has been to draw attention to the fact that the practice of free exchange presupposes a system of rights, but it has not been established how this relation is important to our understanding of the formal structure of rights. To determine the place occupied by the material practice in the general practice of social association, it would be helpful to outline what is meant by saying that the formal structure of social association exists.

It was noted above that the formal structure of social association or the system of rights is constituted through the mutual recognition of men as persons free to determine their own ends. Such a community of persons is the practice within which any individual can be said to have claims of right. Further, we saw that the practice gives rise to two classes of determinate rights. First, a person, as member of a practice in which no limits are set as to the ends that can be adopted, is entitled to the general right that he need not serve the ends of others. Second, a person in exercise of his right to set his own ends within the practice has the special right to entitle others to set specific ends on his behalf under certain special relationships. The more general importance of these two classes of determinate rights is that they can be embodied in positive laws and be supported by public authority. Once the practice of rights is established in positive form, knowledge of the specific

terms of the practice as well as their enforcement does not depend on the contingent decisions and actions of the individuals who are party to the practice. Thus, in its determined form as positive law, the practice exists as a set of principles that are consciously upheld by public officials as the standards governing the behavior of individuals within the practice. But before we can say that the system of rights exists in its determined form, we need to establish how the bulk of the population who are not officials enters the practice. For if it is the case that only the officials consciously uphold the terms of the practice and the bulk of the population generally disregards the terms, then the practice cannot be said to exist at all. Thus, for the formal practice of rights to exist, although the majority of people, unlike the officials, may not know the terms of the practice or consciously uphold them as standards of behavior, they must generally obey the terms of the practice.

The relation of the formal structure of social association to the material structure can be recognized if we consider the conditions for habitual obedience by the majority which is necessary if the formal structure of social association is to exist. Obedience of the terms of the practice need not of course involve recognition of them as the standards of behavior governing the relations of men in a community of persons. What obedience involves is simply following the rules of the practice for whatever reasons.

But even this minimum requirement for obedience without which the formal structure of social association cannot exist will not be fulfilled unless certain important conditions obtain. A person cannot be said to obey laws habitually if he is not engaged in activities which are governed by the law. The condition that the person be engaged in activities involving the law is crucial, for otherwise habitually obeying the law would be reduced to what may be the quite different matter of not violating the law. The fact that a people of a certain country do not violate the laws of another country does not mean that they habitually obey the laws of the latter and are, therefore, part of its legal system. Similarly, if in a country the bulk of the people do not violate the laws of the legal system, it does not necessarily mean that they habitually obey the laws and are, therefore, part of the legal system. It may also mean that the majority of the people are engaged in activities not governed by the law and that they are not part of the practice of rights and the legal system to which it gives rise. Thus, for the bulk of the population to habitually obey the law, there must be an activity in which they are generally engaged that is governed by the law.

To summarize: for the formal system of rights to exist, first, there must be officials, who recognize the laws as the standards of behavior in the relations among persons and who apply the laws to particular cases as well as enforce

obedience. Second, the rest of the people who comprise the vast majority of the population must habitually obey the determinate terms of the practice as set down in positive law.¹⁵ Until these two conditions are fulfilled, the formal structure of social association cannot be said to exist. But, if the majority of the population enters the legal system through habitual obedience to the laws, then there must be an ordinary activity in which most people generally take part that is governed by the principles of right. As we saw in the second part of this chapter, the satisfaction of needs and wants under a mode of production for free exchange requires in practice the treatment of all objects as values. But the standard of value governing the practice of exchange of objects of utility presupposes the system of rights. In engaging in the satisfaction of their needs, people do not, of course, give direct and explicit recognition to the

¹⁵On the two minimum conditions for the existence of a legal system, see H.L.A. Hart, The Concept of Law, op. cit., pp. 111-114. It is important to notice that Hart does not inquire into the conditions for habitual obedience by the bulk of the population to the law which he holds to be one of the minimum conditions for the existence of a legal system. The discussion here of the material structure of social association is an attempt to account for the majority's habitual obedience to the legal system without which, according to Hart himself, a legal system cannot exist. In Chapter II we saw that Hart fails to provide an adequate explanation of the other condition of a legal system in his discussion of "the rule of recognition." Thus, the two elements which, on Hart's own account, are necessary if a legal system is to exist and thereby become a concrete practice are left unexplained.

principles of right. Rather, by ascribing values to the totality of objects in exchange they are giving tacit recognition to their status as persons and hence to their membership of the practice of rights. And in effecting the exchange of goods necessary to the satisfaction of their needs, under this mode of production, they enter a variety of contractual relations which involve the tacit, mutual recognition of those party to the contract as independent agents free to pre-empt things for their own ends and, therefore, as members of the practice of rights. But since all that is required for them to give habitual obedience to the terms of the practice of rights is that they generally engage in activities involving these terms, the satisfaction of needs and wants in a mode of production for free exchange is an activity of the required sort. In short, the system of rights exists only under the conditions in which the satisfaction of needs and wants is conducted in a mode of production based on free exchange. That is to say, the formal system of rights and the positive legal system to which it gives rise can exist only in this materially determined form. And it is the system of rights that is interwoven into the ordinary activities of men which constitutes the practice of social association.

CHAPTER IV

THE DYNAMISM OF THE PRACTICE OF SOCIAL ASSOCIATION

I. Conflicts in the Practical Structure of Right

In this chapter, I propose to outline some of the important questions of social association that are outstanding once the practice of rights is established. The cluster of questions that arise within a practice of rights has to do with the claims of men to the substantive benefits of society. The assessment of these claims constitutes what may be termed social justice or, more specifically, distributive justice. In the examination of the problems concerning the status of the claims of men to the substantive goods of society, I shall not attempt to furnish a solution in the way of a theory of distributive justice. Instead, the nature of the justification appealed to in the assessment of these claims will be considered to point out how the outstanding questions of social association appear in a new light once the fundamental structure of social association comes to be seen as a practice of rights. In the explication of the proposals advanced as solutions to the problems of distribution, I shall be concerned only with the nature of justification. I shall not take up the complicated question of the persons and offices discharging the essentially social function of distributive justice. The proper settlement of the claims of men to the

goods of society is an important juncture at which the social and political come into contact.¹ For it is possible to question the justice of an otherwise acceptable assessment of the claims to societal goods on the basis of the nature and constitution of the persons and offices carrying out its execution. I shall leave aside this related political question and focus instead on the justification employed in deciding on the claims to societal goods which is the social aspect of distributive justice. The ultimate object is to suggest that a resolution of the different and competing claims to the benefits of society would be of a particular kind insofar as these substantive claims are advanced within a practice of rights.

We saw earlier that the practice of rights is constituted through the mutual recognition of men as persons who are free to determine their own ends. As members of a community of rights, all men are equal. They are equal not because there is some characteristic that they all possess in the same measure, but because they enter the practice of rights as persons, which is a capacity belonging to them in abstraction from the specific characteristics they bear and the substantive ends they may hold and, thereby, apart from the various respects in which they may be unequal. In the

¹For an analysis of this relation between social and political questions, see Hegel's discussion of the Police and the Corporation: Hegel's Philosophy of Right, op. cit., #230-#256. See especially Para. #236, #252, #255A.

practice of rights which is constituted through the mutual recognition of the capacity of men to decide what they are to be or do, men cannot enter into comparison. It was further noted that in certain important respects even some of the substantive or material activities in which men engage presuppose their membership in a community of persons. In particular, the satisfaction of needs and wants in a mode of production for free exchange involves the use of a standard of value which presupposes the mutual recognition of the equality of men as persons free to determine their own ends. Thus, the practice of rights is established through the recognition of a human capacity in which men can only be equal, and this fundamental equality of men occupies a constitutive place in a realm in which differences and inequalities can obtain among human beings.

The fact that the practice of rights is constituted through the mutual recognition of a human capacity in which men can only be regarded as equals does not mean that there are no inequalities between persons within the practice. In exercise of their capacity to determine their own ends within the practice of rights, persons may engage in a variety of special relationships in which they entitle others to decide specific ends on their behalf. Within these special relationships possible under the principles of the practice of rights, persons therefore bear unequal entitlements. The special rights that some persons and offices possess are

sometimes due to the exercise of their basic entitlement within the practice of rights. The ultimate justification for the inequalities of special rights is that men have freely incurred these unequal entitlements in exercise of their capacity to decide what they are to be or do. That the inequalities of special rights are in full congruity with the equality of persons recognized within the practice can be seen in the fact that the justification of these unequal entitlements makes no reference to the substantive capacities and ends of men.² The differential entitlements of persons

²Some writers tend to regard all inequalities within social association as being of a substantive kind. According to John Rawls, for example, all the inequalities attaching to persons and offices are due to the substantive considerations of merit and welfare and are, therefore, to be justified at least in part by appeal to principles of distributive justice. See John Rawls, "Distributive Justice," in Philosophy, Politics and Society (Third Series), ed. P. Laslett and W.G. Runciman (New York: Barnes and Noble, 1967), pp. 58-82. But it seems that the inequalities within special relationships, considered here, have nothing to do with the substantive capacities and ends of men. Similarly, the differential treatment of persons in punishment, which is too large a topic to be taken up here, is not justified with reference to the substantive characteristics of men. The reduction of all inequalities to the substantive kind can also be seen in the writings of C.B. Macpherson. His critique of liberalism is based on the contention that this doctrine links the question of rights to the substantive claims of the greatest good. See C.B. Macpherson, "Post-Liberal-Democracy?" in Canadian Journal of Economics and Political Science, Vol. 30 (1964), pp. 485-495. See also his "The Maximization of Democracy" in Philosophy, Politics and Society (Third Series), op. cit., pp. 82-103. For a critique of Macpherson suggesting that the claims of the greatest good and the inequalities to which it gives rise are distinct from the rights acknowledged in liberalism, see J.W. Chapman, "Natural Rights and Justice in Liberalism" in Political Theory and the Rights of Man, ed. D.D. Raphael (Bloomington and London: Indiana University Press, 1967), pp. 27-42.

and offices in the special relationships within a practice of rights do not, therefore, mark a departure from the principles governing the practice that are constituted in abstraction from the substantive differences among men.

But to say that the practice of rights, forming the basic structure of social association, is established by excluding those respects in which men may enter into comparison is not to suggest that the rich variety of ways in which men can differ never enter into consideration in social association. Nor does it mean that the principles of the practice of rights exclude the substantive features of men from the domain of human interaction. Instead, the point is the limited one that the structure of rights and entitlements to which it gives rise cannot be established by reference to the substantive features men possess or the specific ends they hold which admit of differences. But once the autonomy of the practice of rights and its governing principles is recognized, there is no obvious incompatibility between this sphere of social association and the rest in which substantive aspects of human interaction figure prominently. The practice of rights and the entitlements that it allows are based on the mutual recognition of men as agents free to determine their own ends. But as members of the community of persons, men pursue a variety of specific ends. The only, though crucial, limitation placed upon the pursuit of specific ends by membership of a community of persons is that the

adoption and realization of specific ends must not infringe on the capacity of men to determine their own ends as well as on the entitlements that result from the exercise of this capacity. The satisfaction of this limitation, imposed by the constitutive principle of the practice of rights, leaves a vast area for the pursuit of substantive ends in human interaction. What the constitutive principle requires is that men may not be treated just as means for the realization of a given valued goal, or as the bearers of attributes essential to the attainment of a further end. That is to say, apart from the claims and obligations attaching to the substantive ends that men hold and the specific characteristics they possess, they have basic entitlements as the sources of their own claims. In short, although the rights of men as autonomous agents cannot be overridden by the values of their substantive ends and capacities, they are not the sole claims of human interaction.

Once it is clear that men are not to be treated as having value merely owing to the specific ends they hold and the particular characteristics they bear, there are still a number of questions that can be raised in connection with their substantive capacities and ends. The specific ends that men pursue within a practice of rights may differ, and thus questions may be posed concerning their relative merits. Further, the only conflict that might result from the pursuit of a specific end is not the possible interference with the

formal capacity that other persons possess to a determination of their own ends. The substantive features of the specific ends themselves may stand in conflict and competition. And if there is agreement upon specific ends, there may be conflict and competition in the different ways in which men strive to realize them. Similarly, although the substantive activities of men in a practice of rights presuppose the formal equality of their labor as the productive activity of men free to determine their own ends, this allows for important differences in the substantive features of labor. Thus, the equality of men as autonomous agents free to decide their own ends cannot be the basis either for ruling out or resolving the conflicting differences in the substantive ends they adopt and the specific capacities they possess relevant for reaching these ends.

The formal equality of persons as members of a practice of rights is not only compatible with the presence of conflicting and competing inequalities in the substantive goals of men and their specific capacities, it also extends the scope of these competing inequalities.³ The practice of rights is constituted through the recognition that the claims and obligations of human interaction are not to be accounted for on the basis of a pre-assigned end. In such a practice there is no pre-ordained order in accordance with which the

³Cf. George Wilhelm Friedrich Hegel, op. cit., Para. #200, #200R.

tasks and rewards of social association are allocated. There are no juristic limitations on the individual's right to the appropriation of the benefits of society and the means for their attainment. Since the entitlements of men within the practice of rights are not held in virtue of the possession of certain substantive characteristics such as those of blood-relations or sex, deemed essential to the attainment of a given end, the assessment of substantive claims has to be made through the interactions among men. There are, of course, inequalities stemming from the substantive features of men both in an order in which these are assigned value in terms of a pre-assigned end and in the practice of rights in which the value attaching to these inequalities is decided in the interaction among persons free to determine their own ends. The difference in the nature of the inequalities in the two orders consists in their static character in the former and their dynamic character in the latter. In the order in which the right of persons has not been recognized, the inequalities due to the substantive differences among men cannot be the primary object of competition since their value has already been determined in terms of the pre-assigned, substantive end of society. In the practice of rights, however, the inequalities in the substantive characteristics of men are the object of competition since, prior to the interaction of men, value has not been given to human capacities and the possible titles to the benefits of society that may flow from them.

A number of important problems arise in the competitive, joint enterprise in which each is engaged in the realization of his specific ends. The first problem concerns those who are unable to succeed in the enterprise of competing for the benefits of society. The sources of the difficulties of those who cannot benefit in the pursuit of the advantages of society are varied. Their failure may be due to contingent disabilities of a physical or mental nature. Others who do not suffer from natural incapacities may have talents and powers which are not relevant to the attainment of felt societal needs and desires. In many cases, there may be no problems with their talents and capacities, but they may be without the necessary means for their exercise. Alternatively, the social exigencies of the production of societal goods may require that the powers and talents of a sector of the population be left unemployed. In each of these cases or in combination of them, lesser or greater numbers of the members of social association are withdrawn from participation in the joint, competitive activity in which men strive to attain their particular interest. These members of a community in which each is entitled to determine his own ends are not only incapable of realizing their specific ends, they may also be without the minimum conditions for satisfying their basic needs. The problems of the persons who fall below the demands of the competitive enterprise in which men pursue their specific interests, whether

the failure be due to the contingencies of nature or the arrangements of men, calls for special attention.

Aside from the wide differences between the persons falling at the lower limit of the competition for societal advantages and those actively engaged in the enterprise, there are important inequalities possible among those enjoying relative success. Disparities in the capacities of men as well as in the means necessary for their exercise would yield certain inequalities in the attainment of specific ends. It becomes important, therefore, to see how value is to be given to these inequalities of achievement, and to establish the considerations that would enter into such an evaluation. Thus, a second problem with the substantive differences of men concerns the basis for adjudication between the relative inequalities to which they give rise. A further, though related, question has to do with the object of the total enterprise. It would be important to find out if there are any common interests being pursued in what appears to be a co-operative competition in which all are engaged in an effort to secure their respective specific ends. The significance of such a common interest is not only that it would bear upon the decision between the differing claims of those party to the competitive endeavor, but also that it would indicate whether there are any upper limits to be set to the general competitive endeavor itself.

Differences in the substantive capacities exercised and the specific ends pursued by men within a practice of rights result, therefore, in certain difficulties whose resolution requires appeal to principles other than those constitutive of the practice itself. But the striking characteristic of social association does not consist merely in the fact, often overlooked in such doctrines as classical utilitarianism, that this form of human interaction is governed by principles both of a formal and substantive kind. It is also important to see whether the principles, if any, governing the substantive capacities and ends of men have any bearing on the formal principles constitutive of the fundamental structure of a community of persons. And if the two kinds of principles come into conflict, conceptual and practical decisions need to be made to find out if and how they are to be reconciled.

II. Proposed Solutions: The Appeal to the Principles of Distributive Justice

The principle of distribution according to need can be the basis for remedying the conditions of those persons falling outside the competition for the benefits of society. To understand the principle involved, it would be useful to consider the question of needs briefly. For the purposes of our discussion 'needs' will be understood as the basic necessities of men without which living cannot be sustained. With changes in the societal forms of production, the goods

necessary for fulfilling these needs may change. But these transformations would not affect the nature and extent of the needs themselves. For example, in a society in which the care of illness is undertaken by highly skilled technicians making use of manufactured medicines, the goods needed for the cure of illness would be much greater than in a society in which specialized skills and medicines are not utilized in the cure of illness. But in both cases, the basic need is the same. The claim that basic needs are the same might suggest that needs cannot serve as the basis of distribution. There are, however, significant ways in which inequalities may arise in connection with needs. Differences in need may be due to inequalities in the possession of the necessary means for their fulfillment. For example, of two persons living in the same disease infested region, one may be in possession of the means of protection and cure while the other is without them. Alternatively, a person living in an area infested with diseases has greater needs than people living under less trying health conditions. Here, the inequality is in the need itself and not in the means for its alleviation. But in spite of these different sorts of inequalities, what remains the same is the maintenance of a certain level of health. The measure of the inequalities in basic needs is the attainment of a level of life which is the outcome of their satisfaction. And in all cases in which the needs of men may be unequal, the minimum level of human well-

being for each can only be reached through an unequal distribution of goods.

It has been suggested that an unequal distribution of societal goods would result in the maintenance of a minimum state of living among all men. It is not as yet clear, however, what principle would justify the unequal distribution of benefits for unequal needs. The justifying principle for the differential allocation of goods is that of equal treatment of equals and correlatively, the unequal treatment of unequals. The principle of equity requires that similars be treated similarly, and dissimilars differently. Hence, in order that men secure equal treatment with respect to the enjoyment of a certain, common, minimum level of living that is fitting for humans, their varying needs, barring them from attainment of this condition, have to be met through the requisite amount of goods. It is important to note, however, that insofar as needs are the basis for the application of the principle of equity, the requirement that men be treated similarly in those respects in which they are similar is not merely a formal principle. The nature of the relation that obtains between men's needs and the goods they require introduces an element of determinacy into the principle of equity. Certain sorts of needs are the basis for the demand for goods. To have a basic need is to be without the goods that are essential for maintaining a necessary condition of life. It is because a basic

connection exists between basic needs and goods that needs can serve as the grounds for access to certain benefits. Not only is it the case that a relation exists between basic needs and certain goods, but also specific basic needs are related to specifiable kinds of goods. Further, the amount of the given sort of goods required to satisfy a particular need can be determined. Thus, at the level of production prevailing in a society, the relation of basic or subsistence needs to goods is constant.⁴ The constancy of the claim to goods based on needs allows for a meaningful application of equity as a principle of distribution. For in this case, equity requires not merely that unequal needs receive correspondingly unequal consideration. Equity further requires that the unequal needs of men receive unequal amounts of the requisite goods in proportion to their need. Thus, the principle justifying the unequal distribution of goods to meet unequal needs is the principle of equity which is linked to the principle of proportion in its application.

The fixed relation between basic needs and goods that figures importantly in the application of the principle of equity, justifying distribution according to needs, is related to another basic feature of basic needs. The claims of basic needs advanced by men are not competitive. The non-competitive, though unequal, character of basic needs can be seen in several ways. It was noted that basic needs bear

⁴Ibid., Para. #244.

definite relations to societal goods. Thus, unlike non-essential needs and desires in which the object of the claim is open to decision, with basic needs the object of the claim is subject to specific limits. Further, to have needs is to have the grounds necessary for access to certain goods. Since the basic needs are the grounds for the goods to overcome them, there can be no genuine want for the goods without the need. All claims of basic need are, therefore, legitimate. Moreover, once the presence of the basic need is established, there cannot be any major problems over setting limits to the kinds and amounts of the societal benefits requisite for its fulfillment. These various features of the claims of basic needs rule out different ways in which competition among individuals can arise in the equitable allocation of goods to unequal needs.

Although the claims of basic needs as a basis of distribution are not competitive between individuals, there may be conflicts between the claims of basic needs and the claims to goods of the members of society as a whole. If the level of production prevailing in a certain society is so low that a vast majority of the population lives barely above the minimum state of well-being, the unequal distribution of goods to meet the unequal needs of the few who fall below the minimum would be problematic.⁵ For in this

⁵An example would be a feudal society living off subsistence agriculture in which a few fare well, some are

condition in which societal goods are scarce, any advantages withdrawn from the majority to meet the unequal needs of the few may result in even greater numbers falling below the required minimum. To insist upon the principle of equitable distribution according to needs in a situation of limited social production would, therefore, be disastrously self-defeating. For the end or object of the principle of equity with respect to needs would be lost.

Although the principle of equity requires the unequal distribution of goods to meet unequal needs, the object or end of the differential allocation of benefits is the equal treatment of men. In the equitable treatment of the needs of men, the substantive principles of distributive justice and the formal principles governing the practice of rights come together. Men are treated differently under the substantive principle of distribution according to need so that

unable to subsist, but most survive. Now it is often argued that distribution of land into equal though much smaller shares would bring many below the subsistence level. Collectivization of land is an attempt to solve this dilemma. The more general problem concerns the application of theories of marginal productivity and distribution to the question of developing economies. Marginal theories imply that benefits be allocated on the basis of marginal contributions to production at the existing level of production. What is ignored here is the consideration of the potentials for production whose attainment would result in greater surplus and would, therefore, allow the application of the principles of distributive justice. For a critique of such theories of economic growth see, for example, Maurice H. Dobb, Papers on Capitalism, Development and Planning (New York: International Publishers, 1967); Paul A. Baran, The Political Economy of Growth (New York: Monthly Review Press, 1967).

they may attain a certain level of life to which all men are entitled. Various kinds of reasons may be given in support of the claim that men should enjoy the minimum level of well being. However, certain kinds of considerations become critical if the equitable distribution of goods according to needs is carried out within a practice of rights. Men enter the practice of rights as persons who are free to determine their own ends. But, unless the substantive necessities of men are fulfilled, it would be impossible for them to exercise their capacity as agents free to determine their own ends. It would be otiose to inform men who are incapable of satisfying their basic necessities that they are, after all, free to decide what they are to be or do. To remind them of their fundamental entitlement as persons would be cynical: "for dead men cannot be free."⁶ It is not the case, of course, that the distribution of goods to meet basic needs is always aimed at the goal of restoring the status of men as persons who are members of a practice of rights. In the situation in which the fundamental structure of social association is not a practice of rights, attending to the basic needs of men may be supported by moral or religious reasons. And the actions would be undertaken for reasons of charity, generosity, or the duties owed to fellow children of God. But, in the circumstance in which men are members of a

⁶S.I. Benn and R.S. Peters, The Principles of Political Thought (New York: The Free Press, 1965), p. 163.

practice of rights which is constituted through the mutual recognition of their capacity as persons free to determine their own ends, the principle governing the distribution of goods to meet unequal needs has a distinctively social end. It is a principle of justice.

There is not only a conceptual necessity but also a practical urgency to the social distribution of goods to satisfy basic needs in a society whose fundamental structure is a practice of rights. In a society in which the means of satisfying needs and wants are appropriated by the whole community composed of a network of kinships, or by an institution such as the church or by a status group constituted through a shared blood lineage, there are natural or religious obligations whereby some of the needs of those dependent on these institutions and offices can be cared for. But in a practice of rights in which the individual is entitled to the appropriation of property, the burden of attending to individuals who fall below the minimum conditions of living cannot be left to natural, moral or religious institutions.⁷ Instead, the main task of fulfilling the basic needs of men has to be performed by institutions rooted in the principles of social association itself. Thus, in principle as well as in practice, the principle of distribution according to need is directed at restoring the status of men as members of a practice of rights.

⁷Cf. George Wilhelm Friedrich Hegel, op. cit., Para. #238, #241.

It should be noted, however, that to say that the substantive principle of justice calling for the equitable allocation of goods with respect to needs has for its end the maintenance of the state in which men are to be treated in accordance with the formal principles of the practice of rights is not to suggest that the two sets of principles are the same. The two sets of principles are clearly different. The substantive principle of equity requires that men with unequal needs receive unequal goods so that they may attain a certain substantive level of well-being. The formal principle, structurally constitutive of a practice of rights, requires that all members be treated equally; and among persons free to decide their own ends, no substantive inequalities are conceivable. The relation between the two consists in the fact that the substantive level of existence which all men are to attain through the distribution governed by the principle of equity is a necessary condition for enjoying their status as persons free to determine their own ends in the practice constituted through the formal principles of right. Not only are the two sets of principles different, but there is a certain sense in which they can be seen to be in conflict. According to the formal principles governing the practice of rights, the individual himself is to decide what he is to be or do. But, according to the substantive principles of equity governing allocation on the basis of need, the condition of the individual, at least with

respect to his basic necessities, is determined through transfers from societal goods in the way of furnishing direct contributions to income or in the provisions for public benefits. On the substantive principles of equity governing distribution according to need, it is, therefore, ultimately other persons that decide what the individual is to be or do. Thus in the case of persons who are without the basic necessities of life, a departure is made from their entitlement to determine their own ends in order to recover the condition in which they are in a position to enjoy their fundamental entitlement as persons.⁸ In short, the substantive principle governing distribution according to need is different from and even possibly in conflict with the general principles constitutive of a practice of rights. The substantive principle is in harmony with the formal principles of right insofar as the former has as its end the restoration of the status of men as members of a practice governed by the latter.

After provisions are made for the problem of those who fall below the minimum conditions of life in the competitive endeavor in which men attempt to realize their specific ends, there is still the question of deciding on the allocation of benefits among those who, in varying degrees, are succeeding in the competitive enterprise. The main basis cited for the distribution of goods among those enjoying

⁸Cf., Ibid., Para. #245.

relative success is that of merit. Merit includes talents, skills, the possession of material resources, the exertion of effort, productivity and combinations of these with the necessary qualifications for supply and demand considerations. All these possible sources of merit have certain important features that figure prominently in the manner in which inequalities of merit may be the basis for the distribution of societal advantages. In particular, there are important differences in the claims of basic need considered above and the claims of merit that result in significant differences in the justification of distribution according to each of these considerations.⁹ In contrast to basic needs that can be removed through specific goods, there are no specific kinds of goods corresponding to a particular merit. In fact, there is no necessary relation between goods as such and particular merits. To know that an individual has greater merits than another is not to be in a position to conclude that he is to be granted a proportionately greater amount of some specifiable goods. Instead, the conclusion to be drawn is that the person with greater merit deserves more of whatever it is that is being allocated. A further difference between the distribution of goods on the basis of the claims

⁹For some of the differences between the claims of need and those of merit, I am indebted to the discussions in: David Daiches Raphael, "Equality and Equity," in *Philosophy*, Vol. XXI (1946), pp. 118-132; Bernard Williams, "The Idea of Equality," in *Philosophy, Politics and Society* (Second Series), ed. P. Laslett and W.G. Runciman (Oxford: Basil Blackwell, 1967), pp. 110-131.

of need and the quite different claims of merit has to do with the competitive nature of the latter. This can be seen in several ways. There may be desires for the rewards of merit without the possession of the requisite merit, in a way in which this is not possible with needs. A person might have some of the conditions of merit, but he may possess them in a measure that is insufficient for winning the benefits. The reason for this has to do with the comparative or relative as well as competitive nature of merits. Whether a person has great merits or not depends on how he fares in comparison with those who display the same attribute. In the case of basic needs, however, the decision of whether a person has them or not does not require reference to other individuals who have these needs. The competitive character of the claims of merit is intensified by the fact that the amount of rewards is to be decided with reference to the relative inequalities in the merits of individuals. This feature of the distribution stems from the fact that merits do not have the constant relation to goods noticed in the case of needs. When distribution according to merits is in question, there is nothing such as the norm of minimum well-being that can be appealed to independently as in the case of the inequalities of need. Thus, distribution according to merits requires unequal and competitive allocation of whatever benefits in proportion to the relative inequalities in the merits of men.

The justification of the unequal allocation of societal benefits on the basis of merit rests on the principle of equity or fairness. That is to say, if men engage in a co-operative enterprise from which they are to gain certain advantages, those who bear greater burdens or otherwise make a relatively larger contribution to the enterprise should receive greater benefits corresponding to their sacrifice or achievement than those who contribute to a lesser degree. The inequalities that result are fair insofar as the burdens and contributions from which they arise are open to all and are freely undertaken. Fairness or equity can serve as a justifying principle of inequalities in distribution according to merit because the offices and tasks to which they attach are governed by the principle of equality of opportunity.¹⁰ Thus, it is only if there is equality of opportunity with respect to the conditions of merit that the unequal rewards resulting from equitable distribution are justified.

There are various kinds of inequalities in the access to the sources of merit that are ruled out by the principle of equality of opportunity. The presence of classes within the co-operative enterprise in which men strive to realize their specific ends can be a strong barrier against equality of opportunity. A class may be composed of people who

¹⁰Cf., George Wilhelm Friedrich Hegel, op. cit., #200.

possess substantial, unearned sources of merit in the form of the means of production, large titles to income or large funds of money. The members of such classes, of course, enjoy greater advantages in the competitive endeavor since they hold the sources for winning benefits. Not only are they not in competition with those who do not possess the opportunities for merit, but in the measure that the rest are barred from access, the privileged gain societal advantages at the expense of the rest. And since the members of the classes possessing wealth are likely to have greater political power, they can exercise more influence in the way in which the rules of the enterprise are set. In order, therefore, that the enterprise in which men strive to realize their ends be competitive and, accordingly, so that the consequent share of benefits be fair, it is essential that the sources of merit are not concentrated in the hands of a class of the members of social association. Measures for correcting the interferences with the equality of opportunity due to concentration of wealth and power among a class of the members of society include taxation on inheritance and gifts as well as taxes on the incomes resulting from such holdings.

A related and important violation of the terms of the competitive enterprise consists of monopolistic ownership. Monopolistic ownership involves not only the possession of the means for attaining societal benefits, but since the

ownership of the resources is so extensive, it also becomes possible to withhold access from others to the resources directly, and indirectly through control over the determination of prices.¹¹ In this situation, the benefits of the enterprise are distributed under conditions in which many are unable to enter the enterprise altogether, and those who manage to enter take part on terms dictated by those enjoying monopolistic power. At any rate, here the allocation of goods is not the outcome of the competition between men equally free to realize their specific ends; instead the great advantages accruing to those enjoying monopolistic power are gained at the expense of the rest. To restore equality of opportunity among the participants in the joint enterprise, in addition to the measures employed to remove the barriers of class, there would be need for steps to guard against the control over prices and resources and, consequently, the control over the distribution of goods that monopolies command.

The application of the principle of equality of opportunity is not limited to those unearned controls over the sources of merit that are the direct outcome of social

¹¹An important dimension of monopolistic power is the phenomenon of imperialism, which is too vast and complex a subject to be considered in this essay. For Hegel's illuminating remarks on this aspect of civil society, see Ibid., Para. #246. The classic discussion of the subject is to be found in: V.I. Lenin, Imperialism, the Highest Stage of Capitalism (New York: International Publishers, 1939).

and political arrangements. Inequalities in the possession of other conditions for winning merit can be removed if the scientific and technical means for accomplishing this are available. For example, the provision for free and compulsory education is aimed, at least in part, at correcting differences in the abilities of men that serve as the condition for achieving societal benefits. If this is inadequate for remedying unachieved differences in the abilities of men, measures can be adopted for improving the conditions of home, rearing and even conception of the child which have adverse effects on the endowments of education and, eventually, on achievement. Aside from this example in education, there are many physical, psychological and mental ways in which men may be handicapped in the attainment of merit. And insofar as the means of removing them are made available to men through social and political measures, the principle of equality of opportunity can have more extensive application.

To the degree that these and analogous restrictions on the conditions of merit are removed, the competitive joint enterprise would come close to the attainment of equality of opportunity. And in the circumstance in which there is full equality of opportunity, the burdens are borne and contributions are made through the free agreement of the individuals. In this case, the relative merits and demerits of men are fully earned by the members. The individual himself is responsible for his achievements and the benefits

that flow from them. Thus, in the situation in which complete equality of opportunity prevails, the substantive principle of equitable distribution according to merit can find application. The members are legitimately awarded unequal advantages corresponding to their unequal achievements. This critical connection between the equality of opportunity and the principle of equity or fairness, indicates an important relation between the substantive principle of distribution based on merit and the formal principles of right. It was noted that the principle of distribution according to merit has legitimate application only if the relations among the men in competition is governed by equality of opportunity. That is to say, the unequal allocation of societal advantages according to merit is just and indeed possible only if the merits are gained through the competition among individuals who are free to decide their own ends. Otherwise, the principle of equity would have limited or no application, and the distribution would be based on the basis of some pre-existing order and would, therefore, not be a matter of justice at all. Thus, the formal principles constitutive of a practice of rights and the substantive principles of distribution according to merit are related in the sense that it is only if the pursuit of ends is carried out in a system of interaction governed by the latter that the former can find legitimate application. Although the two sets of principles come together in this important relation,

they are otherwise clearly different. The formal principles of the practice of rights allow for the pursuit of ends by individuals who are equally entitled to determine their own ends; the substantive principle of equity or fairness allows for the unequal distribution of goods according to the inequalities of merit that men display in reaching specific ends.

Apart from the distribution of goods according to needs and merits, there is one other important basis for distribution of societal benefits. This is the consideration of what might be termed the 'common' or 'public' good. To see the similarities and differences between the principles justifying allocation according to the common good and those principles justifying distribution according to need and merit, it would be useful to compare the claims of the public good to the claims of need and merit. As opposed to basic needs that are related to specific kinds of goods necessary for their removal, the claims of the public good are not related to particular kinds of goods. Indeed, the claim of the public good requires allocation of benefits irrespective of what the nature of the benefits happens to be. It was also noted that the amount of goods necessary to meet a basic necessity at a certain level of production is relatively constant. No such specification of the amount of goods can be made in the case of the claims of the common good. Rather, in the distribution of societal benefits according

to the common good, what is in question is the relative increase in the aggregate quantity of goods. It should be noted, however, that these differences between the claims of need and those of the common good do not obtain if the level of production in a society is very low such that the common good consists in the basic necessities of life. In this circumstance, the claims of the public good are related to definite amounts of particular goods in an analogous way to the relation of basic needs to societal goods. In spite of this similarity between the claims of the basic needs of individuals and the claims of common necessity, the two kinds of claims can come into conflict. To meet the needs of the public, it might be necessary to overlook the unequal needs of individuals falling below the minimum. However, once the level of production is such that the basic necessities of the vast majority are fulfilled, the differences in the relation between the claims of need and those of the common good to societal benefits emerge. In this case also, the claims to societal benefits based on needs and the claims based on the public good are different and possibly conflicting; but now, the claims of the common good can be satisfied while accommodating the claims of basic individual need.

There are also important differences separating the claims of the common good from those of merit. It was noted earlier that the claim of merit, unlike the claim of basic

need, is not connected to specific kinds of goods. Moreover, the inequalities of distribution that arise due to the inequalities of merit are relative. The character of this relation of merits to goods stems from the fact that particular merits are themselves comparative. Thus, the fact that an individual possesses a greater particular merit than another means no more than he should secure a correspondingly greater amount of whatever available societal advantages. That is to say, if there is a given amount of benefits produced through a co-operative enterprise in which there are two men with differing claims of merit on the benefits, equitable distribution according to merit would be satisfied if half the given amount is distributed unequally in accordance with the differences of merit and the rest is left to waste. This distribution, which is fully compatible with the demands of a just distribution according to merit, is quite incompatible with the demands of a just distribution according to the claims of the public good. For what the claim of the common good requires is not just that societal goods are allocated with fairness, but that the distribution be such that the aggregate of goods made available be the maximum possible. The differences between the claims of merit and the claims of the common good can be seen not only in the situation in which the claims of merit are satisfied while those of the public good are violated, but also in the situation in which the total amount of goods is distributed

to all, such that there is a gain by all in the aggregate of goods possessed while the manner in which they are distributed does not correspond to differences in merit. In fact, the two sorts of claims can come into conflict. That is to say, the satisfaction of the claims of distribution in accordance with one principle might be accomplished at the expense of distribution in accordance with the other. If, for example, a certain society needs to initiate vast production of steel in order to increase its capital goods and consequently to increase the benefits to the public as a whole, the benefits of steel workers would be greater than those of other workers whose merits, as rated by skill and other considerations, may be greater than those engaged in steel production. In this case, the unequal distribution of goods on the basis of the common good overrides the claims of distribution according to merit. Indeed, the unequal distribution on the basis of the common good may favor those with no claims of merit at all. Perhaps the most important example of this is the case of allowing the concentration of the sources of merit in the hands of the few in order to encourage the accumulation of capital that would lead to the attainment of a greater common good. In the satisfaction of the claims of the common good in such situations, the various ways in which members of social association may hold unmerited societal goods, ruled out by the equality of opportunity and required for the legitimate application of

the principle of distribution based on merit, are disregarded.¹² It should be noted, of course, that classes, monopolies and contingent differences in natural endowments may also stand in the way of the claims of the public good. In this case, the measures for controlling, correcting and removing these may be required. But the nature and extent to which these steps are dictated by the claims of the public good will have little to do, except perhaps coincidentally, with the requirement of the equality of opportunity presupposed by the principle of distribution according to merit. Irrespective of the inequalities of need and merit and even in conflict with them, the principle of distribution on the basis of the common good requires the unequal allocation of societal benefits in accordance with the unequal contributions of individuals to the public good.

The allocation of unequal advantages on the basis of the common good is primarily justified through the idea that men should attain the greatest possible good. To settle for

¹²Some writers tend to overlook or minimize the claims of the common good and accordingly regard the principle of equality of opportunity as the core of distributive justice. See, for example, R.M. Honore, "Social Justice," in McGill Law Journal, Vol. 8 (1962), pp. 77-105; Bernard Williams, "The Idea of Equality," op. cit. In The Principles of Political Thought, S.I. Benn and R.S. Peters do not overlook the claims of the common good, but they suggest that the same principles governing distribution according to merit also apply to distribution according to the claims of the common good. For a critique of the reduction of aggregative to distributive principles in Benn and Peters, see: Brian Barry, "Justice and the Common Good," in Analysis, Vol. 21 (1960-61), pp. 86-90.

less would be to limit the realization of the capacity of individuals to determine their specific ends. But the justification of distribution according to the common good does not rest just on the idea that the greatest aggregate of goods should be attained, but also on the further idea that the unequal allocation should result in the greatest good of all. Hence the designation of the aggregate good as that which is public or common. The unequal distribution of goods on the basis of the common good finds ultimate justification insofar as it leads to the substantive equality of men. In this respect, there is a similarity between the justification of unequal distribution according to basic needs and the unequal distributions according to the public good. In both, the inequalities in allocation are justified insofar as they result in the substantive equality of men. There are, however, important differences in the substantive equalities aimed at in the two principles of distribution. In the case of basic needs, it was noted that the inequalities of distribution bring all to a certain fixed level of well-being which they would have to reach if they are to secure their entitlements as persons in the practice of rights. With the common good, however, there is no such recognizable limit to be attained. Since the question here concerns persons whose basic necessities are fulfilled and who can, therefore, fully engage in the practice in which all are free to decide their ends, what is to be equalized is the

satisfaction of the different and growing desires of men within the practice. The point is not merely that the equalization of the satisfaction of the desires of men that go beyond their basic necessities, aimed at by the principles of distribution according to the common good, is bound to be incremental and incapable of full realization. More importantly, since the desires of men have no apparent limits, the substantive equality to be brought about through unequal distributions based on the common good can have no limits. This substantive equality of men calls for indefinite optimization. The differences in the justification of distribution according to merit and distribution according to the common good are also striking. It was noted that the principle of distribution according to merits finds application in the situation in which all arbitrary inequalities in the access to the sources of merit are removed. Although the principle of distribution according to merit presupposes this substantive equality among men, it results in unequal, though fair, distribution of benefits for different achievements. The principle of distribution according to the common good, on the other hand, requires unequal distribution of goods in order to attain substantive equality among men.

The substantive, maximizing equality of men that forms part of the justification of unequal allocation of goods on the basis of the claims of the common good indicates an important problem to be encountered in a theory of

distributive justice. The problem has to do with the fact that the two features of equalizing and maximizing that are constitutive of distribution according to the public good can come into conflict. The conflict between the two aspects is further complicated since both are dynamic. Full consideration of the dynamic conflict between the two is important if the principle of distribution according to the common good is to have legitimate application. Nor is it sufficient simply to acknowledge the presence of the divergent considerations indicated by the two aspects of the principle of distribution according to the common good, as is frequently done in empirical theories of the joint enterprise in which men compete for societal benefits. There is no invisible hand to guarantee that an empirical theory of values, production and distribution would yield a just distribution of the benefits of society. Once it is realized that equalizing as well as maximizing of the aggregates of benefits is involved in the justice of distribution based on the claims of the common good, a theory of distribution would have to afford a decision procedure for determining the relative importance to be given to the two aspects of distributive justice. The decision on the minimum gain in benefits that all would have to receive in order that the increase in the aggregate benefits achieved through unequal distribution are acceptable determines the particular theory

of justice.¹³ On the basis of this decision, returns can be made to those who have suffered inequalities through such measures as direct transfers to income or through provisions for public benefits drawn from the advantages gained by those favored by the initial unequal allocation.

Once basic necessities are removed and the relative importance to be attached to the two dimensions of the claims of the common good is decided, there is still a further problem to be resolved in order to arrive at a general theory of distributive justice. The difficulty concerns the assessment of the possible conflicts between the claims of merit and those of the common good. For, unless merit consists only in contribution to the production of the greatest good, then distribution according to merit and distribution according to the common good can be different and, indeed, divergent. Since there is no pre-established harmony between the two sets of claims, a theory of distributive justice would have to decide on the relative significance to be given to the two principles. As in the case of the two considerations bearing upon the principle of distribution according to the common good, the manner in which the

¹³Theories proposing how the equalizing and maximizing aspects of the principle of the greatest good of all are to be weighted are provided, for example, by John Rawls and Nicholas Rescher. A modified version of the concept of a "Pareto Improvement" is furnished in John Rawls, "Distributive Justice," *op. cit.* The concept of an "effective average" is furnished in: Nicholas Rescher, Distributive Justice (Indianapolis and New York: Bobbs-Merrill, 1966), pp. 35-38.

relative importance of the claims of the common good and those of merit is, in turn, settled would determine the nature of the particular theory of distributive justice.

The difficult task of deciding on the weight to be given to different aspects of distributive justice thereby furnishing a substantive theory of distributive justice, is not taken up here. Instead, the discussion has been limited to explicating the various principles governing the distribution of societal benefits in accordance with the substantive inequalities of the members of a practice of rights, and to drawing attention to the possible relations between these principles. From this discussion, however, it is clear that the construction of a satisfactory theory of distributive justice requires that the question of a just decision of the significance to be attached to its constituent principles be resolved.

III. Difference and Relation between the Sphere of Rights and the Sphere of Production: Distributive Justice Reconsidered

The discussion so far has focused on the question of the substantive inequalities of men that arise in the joint pursuit of specific ends within the practice of rights. We saw that the assessment of these inequalities requires appeal to a number of related substantive principles. The different kinds of inequalities forming the varying basis of claims to societal benefits are justified through different principles.

The differing weight to be attached to these different principles and, hence, to the considerations they support yields a theory of distributive justice. The substantive principles of distributive justice, in turn, stand in important relations to the formal principles constitutive of a practice of rights. In different ways, the various principles of distributive justice acquire their distinctive significance because the substantive inequalities they support arise among men who as persons are equal members of a practice of rights. In the case of unequal allocation for unequal needs, the attainment of a minimum level of well-being is essential so men may enjoy their entitlement as persons free to determine their own ends within the practice of rights. With distribution according to merit, unequal rewards for differences in merit are justified because men as persons hold equal entitlements to the pursuit of their own ends within the practice of rights. Finally, inequalities in distribution based on the claims of the common good are, in part, justified so that men may attain equality in the attainment of the specific ends which they are entitled to pursue as persons. In each instance, therefore, the principle justifying the assessment of the substantive inequalities of men makes reference to their status as members of a practice that is governed by the formal principles of right. Indeed, if these substantive inequalities were to arise within a society whose fundamental structure is not a practice of

rights, the substantive principles governing their assessment may not be a part of justice at all.

Aside from these ways in which the two kinds of principles stand in a positive relation, there are several respects in which they are different, competing and even incompatible. The unequal allocation of benefits to satisfy basic necessities is aimed at lifting men to a substantive level of well-being so that they can exercise their entitlement to decide what they are to be or do. But in order that this be accomplished, the substantive principles of distributive justice require that other persons determine what the individual is to be or do. Thus, according to this substantive principle, men are to be treated in a manner quite contrary to the treatment accorded to them under the formal principles governing the practice of rights. The unequal allocation of benefits according to inequalities in merit emphasizes the various respects in which men can be differentially and unequally treated. In the measure that the evaluation of men on the substantive principle of merit is extensive, the stress in the treatment of men is placed on those substantive features that are comparatively graded and, therefore, less on the reciprocal relations between them as members of a practice who appear in abstraction from these same substantive capacities. Similarly, in the unequal allocations based on contributions to the common good, the treatment of men requires that great weight be attached to

the substantive capacities and possessions of men that are left out of consideration in their mutual relations as members of a practice of rights. In short, the substantive principles summoned to resolve the main problems stemming from the inequalities of men come into conflict, in a variety of ways, with their quite different relations governed by the formal principles of right.

In what follows, I shall briefly suggest that there is a more fundamental conflict between the treatment of persons in a practice constituted by principles which abstract from the substantive capacities and ends of men on the one hand, and the treatment of men as bearers of substantive characteristics governed by the substantive principles of justice on the other. To see this more systematic conflict between the formal and substantive features of social association, it is important to draw attention to the other conflict between the status of men within a practice of rights and their status with respect to the process of producing goods. The bearing of the latter conflict on the former is to be seen in the fact that the principles of distributive justice, as a whole, are more closely tied to the demands of production than has been suggested thus far. If the status of men as members of the sphere of rights is in sharp conflict with their status in the sphere of production, then insofar as the substantive principles of distribution are governed by the demands of production, the

conflict between the substantive principles of justice and the formal principles of right is accordingly severe.¹⁴ A significant element of this reappraisal of the relation between the substantive principles of distributive justice and the formal principles governing the practice of rights is to furnish a clue as to how the conflict between them might find resolution.

As persons, men are members of a practice of rights. But to the extent that they have needs and wants, they have to engage in the process of production. Their status in the practice of rights and in the process of production is significantly different such that men in social association can be seen to belong to two separate, though related, spheres. Within the practice of rights, men appear in abstraction from their substantive capacities and ends in which respect

¹⁴The distinction between the sphere of rights and the sphere of production is introduced in: Karl Marx, Capital, Vol. I, op. cit., subtitled "The Process of Production" which is the central topic of this volume. Marx refers to the two spheres as "The Sphere of Capitalist Circulation" and "The Sphere of Capitalist Production." The three volumes of Capital are a detailed study of the relation and conflict between the two spheres or processes. The central concept (not discussed in this essay) that Marx employs to describe the structural conflict between the two spheres as well as to suggest its possible resolution is that of "surplus-value." The relevance of the relation between the two spheres to the question of distribution is discussed in Capital, Vol. III, op. cit., Part VII, entitled "Revenues and Their Sources." The critique of the principles of distribution is also the subject-matter of: Karl Marx, Critique of the Gotha Programme (New York: International Publishers, 1938). For these observations, I am indebted to Mr. Kenley R. Dove, who has stressed this approach to the reading of Marx's economic writings in his lectures and seminars.

they may be different and, hence, possibly unequal. Even men's productive activities, insofar as they enter into consideration in this sphere, appear in abstraction from their substantive characteristics. Hence, all human labor has equal status if it is considered under the single aspect of the productive activity of men who mutually recognize each other as agents free to determine their own ends. However, in order to satisfy their needs and wants, men have to enter a sphere in which the specific capacities and ends, excluded from consideration in the sphere of rights, figure prominently. Within the sphere of production, what is significant about human labor is not its abstract character as the productive activity of agents who are free to decide what they are to be or do. Here, specific kinds of labor endowed with particular skills and employing certain sorts of instruments are applied to certain things and processes of nature in order to yield given objects. The relations of men in this sphere are quite different from those obtaining in the practice of rights. The sphere of rights is constituted through the mutual recognition of men as persons free to determine their own ends. That is to say, the sphere is constituted in and through the relations of autonomous individuals. The practice of rights is the realm of human interaction par excellence. In the sphere of production, however, the relation of right between men plays no constitutive role, and the fundamental relation is between man and nature. Indeed,

to speak of a human relation in the sphere of production is somewhat misleading.¹⁵ For man enters this sphere as the bearer of the force of labor which is one among other forces, such as those of nature and machinery, whose joint exercise yields a desired object or process. The place of labor in the process of production indicates an important difference in the status of men in the sphere of right and their status in the sphere of production. In the former, men appear as persons entitled to determine their own ends. In fact, the sphere of interaction is constituted through the mutual recognition of this entitlement of men. In the latter, men are part of the forces needed to reach some further end. And since the practice of right excludes any juristic limitations on the individual's appropriation of labor, the labor in question in the sphere of production, insofar as it belongs to a member of the practice of right, is not, in principle, subject to any intrinsically juridical limitations to its use as a means in the process of production. Correlatively, to the extent that the sphere of production is directed to the production of capital as opposed to the production of objects to satisfy specific wants, the status of labor as a means is even more indeterminate. For, if labor

¹⁵In the sphere of production, man "opposes himself to nature as one of her own forces, setting in motion arms and legs, head and hands, the natural forces of his body, in order to appropriate nature's productions in a form adopted to his own wants." Karl Marx, Capital, Vol. I, op. cit., p. 177.

is a means for the production of capital, it is not a means toward some specified end; instead, it is a means for the attainment of ever greater means to reach unspecified ends. Thus, if man's place in the realm of production is mediated through membership of a practice of rights, labor becomes more deeply embedded in the cycle of necessity prevailing in the process of production. But irrespective of the nature of human interaction under which the process of production is maintained, the status of men in the sphere of production is that of necessary elements in the combination of forces required to attain some extrinsic end. And, to the extent that they are compelled to assume this status in the process of production, their quite different status as persons free to determine their own ends in the practice of rights is distinctively affected. For the sphere of right, the social structure of freedom, ends where (and when) the process of production begins.

An important connection obtains between the sphere of production and the status accorded to men within it, and the principles of distributive justice, especially those supporting inequalities based on the claims of merit and the common good. In the case of distribution according to inequalities of need, it was already noted that this allocation of societal goods cannot be carried out if the level of the aggregate of goods produced in a society is so low that any transfers would place most members below the level of

subsistence. With allocation on the basis of basic needs, the advancement of the process of production beyond scarcity is a necessary condition for the application of the principle of justice. With the claims of merit and the common good, however, maximizing production is not just the necessary means for the execution of justified unequal distribution. Increase in production also comes to form a critical part of the justification of differential and unequal treatment based on the claims of merit and the common good. It was earlier noted that differences in merit such as those of natural talents and powers, effort, achievement are to be rewarded by correspondingly unequal amounts of the available societal benefits. But it is plain that the principles of distributive justice do not support the allocation of greater societal benefits for just any instance of excelling in these various considerations of merit. A person possessing immense natural talents for fraud would not have a justified claim to great societal benefits. Similarly, the possession of moral virtue, which would be considered a merit is not the sort of merit that can be the basis for claiming material advantages. It is not the case, of course, that these natural talents and powers are never the basis of claims to societal advantages. If these talents and capacities become in some way essential to the production of more goods, then they can serve as grounds for receiving material benefits. But in this case, the comparison between merits

and the differential allocation of goods does not rest on differences in merit simpliciter. After the appropriate qualifications are made for supply and demand considerations, of different talents and capacities, the only factors that enter into the comparative rating of merits and the correspondingly unequal distribution of goods are those that are constitutive of the process of production. Similarly, effort and achievement, which are important sources of merit, are not always the basis of comparative merit and accordingly of unequal distribution of rewards. There are many ends that a person might adopt and achieve upon considerable exertion. But an individual might attain self-realization--whether this be understood as the cultivation of aesthetic, ethical or religious virtue--without necessarily furthering the ends of others. In this situation, the person's effort and achievement may be valued on a variety of grounds, but it would not be valued in comparison with the merits of others and thus be rewarded through a proportionate allocation of societal benefits. In other words, if the merits of effort and achievement are to be the basis of claims to societal advantages, they must serve societal ends as defined by the process of production.¹⁶

¹⁶The view that distribution on the basis of merit is justified on grounds of utility is suggested in David Daiches Raphael, "Conservative and Prosthetic Justice," in Political Studies, Vol. XII (1964), pp. 149-162. The connection of utility to the ends of production, discussed here, is not considered by Raphael.

It might be thought that the dependence of the principle of distribution according to merits upon the ends of production would be modified by other principles bearing upon this principle of distribution. But the principle of equality of opportunity, which is necessary for justified distribution according to merits, does not alter the dependency relation this principle of justice has to the ends of the process of production. Equality of opportunity only serves to remove arbitrary limitations on the resources available to a person for making contributions to the ends of production. Once equality of opportunity prevails, however, the merits that count in the differential ranking of claims to societal benefits are those that further the ends of production. It was also noted that the formal principles of right have a direct bearing on the principle of distribution. In virtue of their membership in a practice of rights, men are able to exercise their substantive capacities to realize specific ends. Insofar as men are members of the sphere of rights, the nature of these capacities and ends is not determined with reference to a pre-existing order. Accordingly, the rewards, if any, for their exercise are not authoritatively allocated by reference to a pre-established end. Instead, if the substantive capacities of men are exercised within the practice of rights, they are rewarded through societal benefits in the measure that they contribute to societal ends. And what the societal ends are to be is

decided by the process of production. Thus, membership in a practice of rights removes juristic limitations on the distribution of benefits in accordance with differing contributions made to the process of production. In short, the other considerations that enter into the justification of distribution according to merits do not modify and may even enhance the basic dependence of the principle of distributive justice on the demands of the process of production.

The dependence of the justification of distribution based on the claims of the common good on the ends of production is straightforward. Indeed, a general consequence of the reappraisal of distribution according to merit in light of its relation to the ends of production is to bring the claims of merit much closer to the claims of the common good. Distribution on the basis of the common good allows for unequal allocation which is justified insofar as it yields the greatest possible good. Now, it is plain that not all contributions to the greatest good are to be granted rewards through unequal distribution of societal advantages. The full cultivation of aesthetic or moral sensibility can be seen as a contribution to the greatest good; but it cannot serve as the basis of claims to societal advantages. Instead, the only sorts of contributions to the common good that are rewarded through unequal distribution are those that advance the ends of production. The utility to be maximized, as defined by the ends of production, may be quite indeterminate.

Thus, to the extent that the sphere of production is aimed at the expansion of capital, the contributions that are rewarded through distribution are those promoting the accumulating of the means to extend the sphere of production. The claims to distribution based on the common good are, therefore, justified insofar as they maximize the process of production itself. However, it was noted that this principle of distribution is justified not only on the grounds of producing the greatest possible good, but also on the additional ground of producing the greatest good of all. Nonetheless, this further consideration does not qualify the reference to the ends of production in the justification of the distributive principle in question. The fact that unequal allocation for differences in maximizing production is justified only if returns in benefit are made to all serves to modify the kinds of inequalities that would have to be suffered in order to realize the greatest possible good. It does not alter the reference to the ends of production in justifying distribution according to the claims of the common good.

The equitable or fair inequalities of distribution according to the claims of merit and the common good are, therefore, justified by reference to the ends of the process of production. In other words, the substantive principles of justice in social association enhance, rather than modify, the subservience of men to the ends of production. Thus, a just assessment of the substantive inequalities of men in

social association supports the status of men as means for the realization of given ends in the process of production, and undermines their status as persons free to determine their own ends within the sphere of rights. But to see the dependence of the relations of distribution on the process of production opens the possibility that changes in the sphere of production would bring about changes in the principles of distribution. More importantly, to recognize the nature of the conflict between the sphere of rights and the sphere of production would allow us to circumscribe the distinctive features of the process of production whose transformation would result in a fundamental change in the treatment of the substantive inequalities of men such that it would not be in opposition to the treatment of men as persons in the relations of the practice of rights.

Certain quantitative changes in the sphere of production can result in changes in the principles of distribution. An extreme change in the process of production would be the situation in which the level of production is so high that all the goods required are available. Here all persons would have all the goods necessary to satisfy all their wants and desires. If the level of available goods reaches this level, there would be no manifest need for continuing to assign primacy to the process of production. And since there would be a plenitude of goods, there would also be no questions of distribution, and the comparative grading of the

substantive inequalities of men that distribution requires.¹⁷ The major difficulty attending this proposal is the practical feasibility of attaining such a high level of production. A more moderate quantitative change would be the case of an abundance of goods falling short of plenitude such that not everyone can have everything. Here, men cannot withdraw from the process of production, and would, therefore, continue to serve as means to the ends of production. But the returns to all from the results of production would be vast. Indeed, the transfer in benefits might not have to be limited to the inequalities in the varying contributions to the common good or the inequalities suffered from the production of the greatest good. In other words, distribution would not be strictly dictated by the ends of production. But in spite of such changes in distribution possible in this situation of abundance, the subservience of men to the process of production would not be overcome. It may be argued, however, that if there were such abundance, the aim of maximizing production could be given up and accordingly, the unequal distributions on the basis of the unequal contributions to the common good would no longer be necessary. The plausibility

¹⁷Nicholas Rescher recognizes the dependence of the principles of distribution on the process of production. See Distributive Justice, op. cit., pp. 87ff. But Rescher underestimates the impact of changes in production on the principles of distribution because he limits his consideration to quantitative changes in production to the exclusion of qualitative changes that are considered in the rest of this chapter.

of this proposal rests on the view that the desires of men are in fact limited or at least are limitable. For, if there are no limits to the desires of men, nothing short of the availability of all goods to satisfy all desires is sufficient to give up assigning primacy to the process of production and the principles of distribution that it dictates. But human desires seem to have no obvious limits. And in the absence of any discernible limits to human desires, the only possibility left is somehow to curb desires. Aside from the difficulty of arriving at a principle in terms of which a line could be drawn between essential and non-essential desires in this situation, freedom from the necessity of the labor process and therewith the full realization of the value of persons in the practice of rights could only be attained through a moral appeal.¹⁸ In short, if the

¹⁸A major weakness of Macpherson's important critique of western capitalist democracies stems from his reliance on the belief that human desires are or should be limited. See, for example, his: "Post-Liberal-Democracy?", op. cit. and "The Maximization of Democracy," op. cit. The quite different view that the process of production and its optimization is not itself an evil is proposed by Hegel and Marx. Indeed, it is the contention of both thinkers that it is precisely by successfully subjecting himself to the ends of production that man can liberate himself from the necessity of the sphere of production. See, for example, George Wilhelm Friedrich Hegel, op. cit., Para. #194, #195, #197, #198. Marx's analysis can be seen in the following important passage: "in fact, the realm of freedom actually begins only where labor which is determined by necessity and mundane considerations ceases; thus in the very nature of things it lies beyond the sphere of actual material production. Just as the savage must wrestle with Nature to satisfy his wants, to maintain and reproduce life, so must 'civilized man, and he must do so in all social formations and under all possible

changes in the process of production are considered under their quantitative aspect alone, it is difficult to see how they would have major consequences for the status of men in the practice of rights and their status in the sphere of production. The extreme case of a plenitude of goods would mean the abolishment of the primacy of the sphere of production and thereby the resolution of the conflict. But it does not appear that there are any clear and short paths to this world of plenitude. In the moderate case of abundance, there are conceptual and practical problems barring the abolition of the sphere of production and the dictates of the sphere with regard to the assessment of the substantive inequalities of men.

The changes in the realm of production do not merely consist in the increase of the aggregate of goods produced, but also in changes in the process of production itself. It

modes of production. With his development this realm of physical necessity expands as a result of his wants, but, at the same time, the forces of production which satisfy these wants also increase. Freedom in this field can only consist in socialized man, the associated producers, rationally regulating their interchange with Nature, bringing it under common control, instead of being ruled by it as the blind forces of Nature; and achieving it with the least expenditure of energy and under conditions most favorable to, and worthy of, their human nature. But it nonetheless remains a realm of necessity. Beyond it begins that development of human energy which is an end in itself, the true realm of freedom, which, however, can blossom forth only with this realm of necessity as its basis." (emphasis mine), Capital, Vol. III, op. cit., p. 820. Cf. Grundrisse der Kritik der politischen Oekonomie (Berlin: Dietz Verlag, 1953), pp. 592ff.

was noted that in the process of production, labor with specific powers and skills enters into combination with other forces such as those of nature and machinery in order to yield a given end. With the advancement in the process of production, more and better machines are produced which serve as means for the realization of the given ends of production. In a variety of complex ways, the functions hitherto fulfilled by labor tend to be assumed by the machines fashioned by labor. This transformation in the constituents of the process of production is quite straightforward. The problem instead is in seeing the consequences of this transformation for the status of men in the sphere of production. It might be argued, for example, that the growth in the relative importance of machinery over labor in the process of production affects the place of man in this sphere by rendering his task more pleasant.¹⁹ Work may become more

¹⁹This assessment of the changes in the process of production is to be found in some of the writings of the utopian socialists as well as in some contemporary sociological studies of advanced capitalism. Marx's critique of this account of the change in the process of production is indicated in his remarks on Fourier: "Work cannot become play, as Fourier had hoped. Fourier's great merit was to have expressed as an ultimate objective, the demand for transforming the present mode of production rather than focussing his attention on distribution." Grundrisse der Kritik der politischen Oekonomie, op. cit., selected translations by Kenley and Christa Dove. Sociological findings suggesting that work under technology has become enjoyable are considered, and evidence to the contrary is presented in: J.H. Goldthorpe, et.al., The Affluent Worker: Industrial Attitudes and Behavior (Cambridge: The University Press, 1968). Cf., J.H. Goldthorpe, et.al., The Affluent Worker in the Class Structure (Cambridge: The University Press, 1969), pp. 54ff.

pleasant because some of the functions of labor are either fulfilled directly by the machines labor has fashioned out of nature or they are mediated by them. The first feature of this assessment of the significance of transformations in the process of production is that it is primarily psychological. As such, it is an empirical question whether labor is more or less pleasant in the situation in which the objects and processes formed by labor play a more prominent role in the process of production. Whatever the results of such an empirical investigation, insofar as the significance of the changes in the process of production is taken to be psychological, it would make no difference to the social question of the principles of distribution and the status of men within the practice of rights. For, irrespective of the fact that men's function in the process of production is pleasant or unpleasant, their status in the sphere remains that of means to attain the ends of production. There is, of course, no incompatibility between serving merely as a means and the enjoyment of this status or function. But if men are serving as means to reach the ends of production, they remain subject to the differential treatment of the principles of distribution in accordance with their varying contributions to the given ends. More importantly, their status as forces necessary for the ends of the process of production, which underlies their differential treatment under the principles of distribution, undercuts their status

as agents free to determine their own ends within the realm of rights.

The qualitative changes in the process of production may be assigned another significance. It might be argued that the increasing replacement of the force of labor by the forces of machines formed by labor opens the possibility of a new relation between man and nature. In the measure that these changes in the constituents of the process of production have occurred, man's engagement with nature would not be that of a force related to the forces of nature which are necessary to yield a desired end. Instead, man, now freed from the cycle of necessity prevailing in the process of production, would enter into an interaction with nature which is no longer a mere means in the process of production.²⁰ Under this view, nature is autonomous not merely in the limited sense that its function in the process of production is no longer dependent on the exercise of labor; instead, it is autonomous in the sense that it is withdrawn from the process of production in which all the constituent elements are forces serving as means for given ends, and now stands as a possible subject to interact with man. The distinguishing feature of this analysis of the qualitative changes in the process of production is that it is meta-

²⁰This analysis of the transformation of the process of production is suggested in the writings of Herbert Marcuse. See, for example, One Dimensional Man (Boston: Beacon Press, 1964), pp. 235ff.

physical. It rests on an interpretation of the essence of nature as consisting not merely in its employment as means for given ends, but also as having value in its own right. Moreover, in its status as having value in itself, nature is seen as an agent that can enter into relation with human agents. The metaphysical assumptions underlying this view are hard to understand and too complex to discuss here. But even if we assume that this metaphysical interpretation of man and the relation of man and nature is correct, its realization would require changes in the nature of the process of production that are of far greater dimension than those considered thus far. For, unless we assume a plenitude of goods, the process of production must continue to receive stress, albeit with the products of labor and the forces of nature as the most important forces. But the disengagement of labor from the process of production does not itself mean that the status of nature in the process of production has changed. Nature and the products of labor still enter into consideration as the optimal means to reach given ends. Thus, at least in this sphere, nature's status is that of a means and not that of an autonomous subject possessing value in its own right. If the primacy of the process of production has to continue, in light of the absence of a plenitude of goods, the only way in which nature can be seen to be autonomous is if the process of production has changed altogether so that its constituent elements are not means for

reaching given ends. But it is difficult, it not impossible, to see how the process of production can itself become a realm of freedom. Aside from this difficulty standing in the way of realizing the new status of nature and its relation to man, the metaphysical analysis of the qualitative changes in the process of production is limited. For even if nature can acquire this status and enter into the desired relations with men, it is hard to see what the consequences of these changes would be for the distinctively social relation of men which is of concern here.

There is a change in the nature of the process of production that would have a special significance for the social relations of men and the principles that govern their interaction. Assuming that there is no plenitude of goods and hence no immediate prospects of abolishing the primacy of the sphere of production, it was noted that there would still be significant changes in the process of production in a situation of abundance. In particular, with the growing capacity of labor to form nature in such a way as to serve given functions, the tasks hitherto fulfilled by labor could be assumed by its products. But in noting the general change in the relative importance of the constituents of the process of production, the specific manner in which the process itself is transformed was not specified. The general process of production consists in the employment of labor endowed with specific powers and skills in combination with certain

instruments which on application to the forces of nature yield certain ends. In the course of the process of production, labor shapes the forces of nature so that natural objects themselves may embody the varieties of powers and skills of labor.²¹ Indeed, the development of technology has generally consisted not in the mere embodiment of the powers and skills of men but also in their expansion and intensification. In the measure that this forming of nature by labor advances, nature becomes autonomous. Nature is autonomous not in the sense of being no longer a means for the specific ends of man and hence a subject with value of its own. Rather, nature is autonomous in the more modest sense that its function in the process of production is not dependent on the specific talents and powers of labor since these have been implanted in nature itself. That is to say, nature is not autonomous from the sphere of production as the metaphysical interpretation requires; rather, the sphere of production, now consisting of the forces of nature and the natural forces formed by labor, is relatively autonomous from the direct labor of men. The autonomy of the sphere of production from labor which is the outcome of labor's own achievements, has important consequences for the substantive principles of human interaction that are dictated by the ends of the process of production.

²¹For the analysis of the transformation of the process of production, see George Wilhelm Friedrich Hegel,

To say that the sphere of production is relatively autonomous means that the specific powers and skills of labor are no longer primary constituents in the process of production. In other words insofar as the powers and skills of men are implanted in nature itself, then, to that extent, the process of production is not determined by the substantive features of labor. But it is precisely the relation of the various inequalities of men to the process of production that serves as the basis for the differential treatment of their substantive capacities and powers. Once the relation of the substantive capacities of men to the specific ends of the process of production is severed, the fundamental basis for the differential treatment of the substantive capacities of men no longer obtains. This change in the treatment of the substantive capacities of men resulting from the transformation in the process of production in a situation of abundance can be seen in the changes in the various claims of unequal distribution of societal benefits.

In the somewhat special case of unequal distribution according to basic needs, it was noted that differential treatment is not justified with reference to differing contributions to the ends of production. Rather, the claims of need and the sphere of production are related to the extent that a level of production above subsistence is a causally

op. cit., Para. #198. Cf. Karl Marx, Grundrisse der Kritik der politischen Oekonomie, op. cit., pp. 592ff.

necessary condition for effecting allocation justified on the basis of necessities. The advancement in the process of production envisaged would, of course, involve the attainment of abundance and hence would allow for distribution according to basic needs. There is, however, another difficulty with distribution based on basic needs. The end of such allocation is to elevate men to a level of well-being whereby they can enjoy their entitlement to determine their own ends within the practice of rights. But, according to this principle of distribution, in order to restore the capacity of men to decide what they are to be or do, other persons would have to decide what the person in need is to be or do. This incompatibility between the formal principles of the realm of rights and the substantive principle of distribution based on need is overcome through the transformation in the process of production. For if the process of production is not determined by the substantive capacities and powers of men, the goods distributed to those with basic needs would not be the products of any specific labor. Accordingly, the individual would receive the societal benefits to meet his basic necessities, although no other person would decide what he is to be or do. In short, quantitative advances in the process of production provide the conditions for allocation according to need; and the qualitative advance in the sphere of production overcomes the incompatibility in

the treatment of men under the formal principles of right and the substantive principle of justice.

With the claims of merit and the common good, it was noted that inequalities in distribution are justified with reference to the ends of production. Not all differences of merit are rewarded through societal benefits. Indeed, the comparative ranking of merits and the correspondingly differential allocation of societal advantages is based on the differing contributions to the process of production. But to the extent that the realm of production is transformed so that the substantive powers and talents of men are supplanted by nature, there is no basis for the comparative grading of the capacities of men and hence for the differential treatment they receive in accordance with the principle of distribution based on merit. The consequences for the unequal allocations to the common good would be similar. Assuming that the means of production are publicly owned so that provisions for overhead capital and the accumulation of capital do not depend on the powers and decisions of individuals, the only basis for unequal distribution would be those powers and talents of men that yield the greatest possible contribution to the ends of production. But with the envisaged qualitative changes in the process of production, the substantive capacities of men are not direct constituents of the process of production. Thus, the differential treatment of men on the basis of the differences

in their merits and their contributions to the greatest good, justified under the principles of distributive justice, are without justification insofar as the process of production is not determined by the substantive capacities of men that are the sources of the varying claims to societal benefits.

IV. Concluding Note: Beyond the Labor Theory of Value

The discussion in the preceding section has focused on the consequences of certain quantitative and qualitative changes in the sphere of production for the principles of distribution. But the transformation of the process of production is of special significance to the conflict between the status of men in the sphere of production and their status within the practice of rights. In the practice of rights, men appear as persons who are free to decide on their own ends. On the other hand, men enter the realm of production as the holders of forces that are necessary for reaching further ends. Their status as members of a practice of rights is, therefore, undermined by their status within the sphere of production. But under the envisaged changes in the sphere of production, the substantive powers and talents of men cease to be among the prime constituents of the process of production. Thus, through the achievements of labor in the process of production men are able to set themselves free of the subservient status within the process of production which stands in conflict with their status as

agents free to determine their own ends within the practice of rights. The severance of the connection of the sphere of rights to the sphere of production also means that certain principles governing the interactions of men within the practice of rights that are necessitated by the relation of this realm to that of production would no longer be necessary.

The use of labor as the standard of value in the practice of rights is the most significant and pervasive manner in which the principles of the sphere of production enter the sphere of rights.²² It was noted that men belong

²²In the Critique of the Gotha Programme, op. cit., Marx envisages a society in which the means of production are commonly owned and equitable principles of distribution prevail. Marx argues that in such a society, the interactions of men are still bound by the dictates of the process of production. He writes: "Here obviously the same principle prevails as that which regulates the exchange of commodities, as far as this is exchange of equal values. Content and form are changed, because under the altered circumstances no one can give anything except his labor, and because, on the other hand, nothing can pass into the ownership of individuals except individual means of consumption. But as far as the distribution among the latter is concerned, the same principle prevails as in the exchange of commodity equivalents, so much labor in one form is exchanged for an equal amount of labor in another form The right of the producers is proportional to the labor they supply; the equality consists in the fact that measurement is made with an equal standard, labor." (pp. 8-9) He proposes instead, that the interactions of men can be considered free from the necessities of production not merely when equitable distribution prevails, but: "after the enslaving subordination of individuals under the division of labor, and therewith also the antithesis between mental and physical labor, has vanished." (p. 10) The freedom from the division of labor imposed by the process of production also entails the abandonment of labor as the standard of value, which is briefly considered in what follows.

to the practice of rights as persons free to determine their own ends. This fundamental capacity of men is exemplified in their right to property entitling them to pre-empt all external things for their own ends. Indeed, it is the mutual recognition by persons of their capacity to set their own ends, manifested in their right to property, that establishes the practice of rights. Part of the person's right to property, under such a practice, is the entitlement to the appropriation of labor-power. However, of the various ways in which men may be proprietors or the ways in which they can appear as persons free to determine their own ends, labor or the productive activity of men tends to hold a pre-eminent place as the standard of value in the practice of rights. Labor serves as the standard of value in being generically related to the aggregate of values produced in the activity of satisfying the wants and desires of men, although, as the productive activity of men free to determine their own ends it itself has value in its own right and is not, therefore, among the things to be assigned value. Hence, labor or the productive activity of men free to set their own ends is the invariable standard employed in the determination of the value of labor-power and the other means of production that are exchanged in the course of the joint enterprise in which men strive to satisfy their needs and desires.

However, under the qualitative changes in the sphere of production, the specific talents and powers of men are not prime constituents of the process of production. But in this case, in which labor plays an extremely limited role in the process of production, there is no point to the isolation of the productive activity of men from their general entitlement to pre-empt things for their own ends to serve as a principle governing the manifestation (and, indeed, the constitution) of relations within the practice of rights. In other words, to the extent that the realm for the satisfaction of needs and desires is independent of the productive activity of men, the productive aspect of the autonomy of men need not be assigned a privileged place in the practice of rights. Similarly, if the process of production is relatively independent of the productive capacities of men, the embodiment of the general entitlement to property need not consist exclusively of commodities or those objects that are produced for use as well as for exchange, and whose values are determined by labor. The special status assigned to commodities as the exemplification of the embodiment of the general entitlement of persons to pre-empt things for their own ends as well as the special status assigned to the productive activity of men as the paradigm case of the capacity of men to set their own ends is based on the dependence on the productive talents and powers of men of the process of production. To insist on regarding commodities as the

paradigm embodiment of the capacity of men to determine their own ends and to insist on labor as the societal paradigm of the capacity of men to determine their own ends would be a form of fetishism. It is as if men were to continue amassing armor and assigning great value to the makers of better and more elaborate armor in a situation in which the human species had undergone great physiological and psychological changes making it immune from attack.

I do not wish to imply, of course, that the abandoning of labor as the standard of value as a consequence of the changes in the process of production whereby men's productive capacities are not constituent factors in the process means that, henceforth, no value is to be assigned to the substantive characteristics of men. Instead, the claim is the limited one that the societal treatment of the substantive features of men would be quite different. Once the process of production is not dependent on the substantive capacities of men, the division of labor or the differentiations of the talents and powers of men in accordance with the exigencies of production would no longer be essential. But if the talents and powers of the individual are considered as a whole, there would be no possibility for the comparative ranking of his substantive capacities with those of other persons and, hence, for granting them differential treatment. It is hard to see how the moral, aesthetic, intellectual and physical capacities of a person taken as a whole can be said

to be better than another person's. It is even more difficult to see how these can be quantitatively ranked so that they may serve as the basis for distributing determinate societal benefits. There can, of course, be recognition for exemplary individuals excelling in some or all of these powers and talents. This form of reward would, however, be quite different from the determinate allocation of societal benefits that are presently the object of competition among persons. There could even be distribution of determinate societal benefits essential to the attainment of the ends adopted by men. But such distribution would not be based on the comparative and competitive claims to whatever available benefits that is dictated by the ends of production.

These remarks have been aimed at indicating those aspects of the interaction of men within the practice of rights that are dictated by the relation of the realm of rights to the realm of production. We can see that some of the principles governing the interaction of persons would lose their point if men do not figure as one of the forces in the process of production which is necessary for the satisfaction of human needs and desires. But to indicate these changes furnishes no clue as to the principles governing the treatment of the substantive capacities of men which would continue to appear in a social association based on the formal practice of rights. Unless these principles are furnished, it would be difficult to understand how the

structure of rights and its constitutive formal principles can have a footing in the lives of men. And until this relation of the formal to the substantive is grasped, it would be difficult to specify the form of life that would develop in the interactions of men within the practice of rights. The task of elucidating this new form of life would also depend on the realization in practice of a community of persons whose interactions are not dictated by the demands of the process of production. In the words of Hegel's famous aphorism on the debt of philosophy to practice:

When philosophy paints its grey in grey then has a shape of life grown old. By philosophy's grey in grey it cannot be rejuvenated but only understood. The owl of Minerva spreads its wings only with the falling of the dusk.²³

²³George Wilhelm Friedrich Hegel, op. cit., p. 13.

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